145-132

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1890.**

No. ~~710~~. 296

JOSEPH FURRER, AS ADMINISTRATOR OF THE ESTATE OF WILLIAM FURRER, DECEASED, APPELLANT,

*vs.*

JAMES M. FERRIS, RECEIVER OF THETOLEDO, COLUMBUS AND SOUTHERN RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

**FILED DECEMBER 4, 1888.**

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1 & 2 *Pleas.*

Pleas in the circuit court of the United States for the northern district of Ohio, western division, held at the United States court-rooms, in the city of Toledo, in the district aforesaid, before the Hon. Howell E. Jackson, circuit judge for the sixth circuit, and Hon. Martin Welker, district judge for the district aforesaid, on the 29th day of June, being a day of the June term of said court, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States of America the one hundred and twelfth.

3 *Opening of Case.*

The case of The American Loan and Trust Company *vs.* The Toledo, Columbus and Southern Railway Co., being a cause properly brought in the United States circuit court for the northern district of Ohio, western division, and pending therein, upon the allegations of the petition filed therein, a receiver having been properly appointed in the case, an order was, upon application of Joseph Furrer, administrator of the estate of William Furrer, deceased, duly made by the court upon the 15th of December, 1887, as follows, to wit:

*Leave to File Intervening Petition.*

United States Circuit Court, Northern District of Ohio, Western Division.

THE AMERICAN LOAN AND TRUST CO., Plaintiff,
*vs.*
THE TOLEDO, COLUMBUS & SOUTHERN R'Y CO. *et al.*, Defendants.
} Journal Entry.

This cause coming on to be heard upon the application of Joseph Furrer, administrator of the estate of William Furrer, deceased, for leave to file an intervening petition herein, the court, being fully advised in the premises, does order that said administrator have leave to file his said petition *instanter* against the receiver of the defendant railroad company, and that said receiver file his answer thereto on or before the 5th day of January, 1888; and the court further orders that the issues so made by the said petition and answer thereto be referred to A. J. Ricks, as special master, because of his experience in matters of such character, to hear testimony and argument of counsel as to the liability of said receiver and the damages said administrator should recover in case said receiver is found liable for the wrongs complained of in said petition, and to speedily report the same to the court, together with the testimony taken by him;
4 and said special master is hereby invested with all the powers conferred upon masters in chancery by the equity rules of this court for the purposes of said reference.

And afterwards, to wit, on the 15th day of December, A. D. 1887, the following intervening petition was filed in this cause in said court, to wit:

*Intervening Petition.*

United States Circuit Court, Northern District of Ohio, Western Division.

| | |
|---|---|
| THE AMERICAN LOAN AND TRUST Co., Plaintiff, *vs.* THE TOLEDO, COLUMBUS & SOUTHERN R'Y CO. *et al.*, Defendants. | Intervening Petition of Joseph Furrer, Administrator of the Estate of Wm. Furrer, Dec'd. |

Now comes Joseph Furrer, a resident of the county of Wood and State of Ohio, and represents to the court that upon the 6th day of December, 1887, he was duly appointed and qualified administrator of the estate of William Furrer, deceased, by the probate court of Wood county, Ohio, and asks to be made a party interpleading in this cause, and in that behalf says—

That on the 14th day of April, 1886, the above-entitled suit was commenced in this court and such proceedings were had by appearance of parties and consent of counsel that the said court had jurisdiction for that purpose, and did, on the 9th day of April, 1887, appoint James M. Ferris receiver of the Toledo, Columbus and Southern Railway Company, with all its property and effects, including its railway from Toledo, Ohio, to Findlay, Ohio, with all its tracks, rights of way, terminal facilities, stations, rolling stock, equipment supplies, monies, accounts, bills receivable, and all other its personal and real property of every kind and nature, wherever situated, with full power and authority to the said receiver conferred by the statutes of Ohio upon
5 receivers and such as are usual in courts of equity, the said receiver to take immediate possession of said company's property and effects of every nature and kind, wherever situated, and to run and operate the said railroad, and for that purpose to employ all such help and aid as he may find necessary to run and operate the same economically and prudently, in the interest of all the parties interested in said property, and to collect all monies that may be due to said railway company; to make payment of all bills, accounts, and expenses legitimately incurred in the running and operation of said railroad and rolling stock and keeping the same in good order and repair, so that it can be safely and properly employed in the transportation of passengers and freight, and in general to do all acts and things proper and necessary to protect the franchises, property, and rights over which he was appointed receiver; and the court further ordered that the said James M. Ferris should give a good and sufficient bond in the sum of $30,000.00, to the acceptance of the court, for the faithful performance of his said duties as receiver; all of which he, the said Ferris, duly complied with, and thereupon qualified and entered upon his duties as such receiver;

and afterwards, to wit, on the 23rd day of June, 1887, upon application of said receiver therefor, this honorable court did grant him the further authority to do the necessary ballasting and fencing and constructing necessary side tracks and depots to place said railroad in good condition; that while the said receiver, James M. Ferris, was in possession of said property and maintaining, repairing, and operating the said railroad, pursuant to the orders of the said circuit court, in and through the county of Wood, in said State of Ohio, at a point in the township of Perrysburgh, in said county, where the track of the said Toledo, Columbus and Southern railroad crosses a
6 certain wagon road, commonly known as "the avenue road," constituting a crossing, publicly known as "the avenue crossing," and where the grade of the said railroad is higher than the grade of said highway, the said receiver did not use care and precaution, as it was his duty to do, and did not so conduct himself in a careful and prudent manner by placing and maintaining said crossing in good repair or in a reasonably safe condition by filling in the approaches and crossing with sufficient and suitable material to constitute the same a substantial and permanent way of easy ascent and descent for the passage of vehicles and teams along said road without danger or hindrance; but, on the contrary, did, on and before the 15th day of October, 1887, wholly fail and neglect so to do. Said receiver kept and maintained the approaches to said crossing in a steep, uneven, and precipitous condition, without sufficient and necessary filling therefor, after actual notice thereof; and, furthermore, while in the fulfillment of the said orders of the court to ballast said railroad, did recklessly raise the track at said crossing without making sufficient approaches thereto, and did place and cast large blocks and pieces of unbroken stone upon said crossing and approaches and in the wagon track over the same, and did, on said 15th day of October, 1887, keep and maintain said defective crossing with such stones there in utter disregard of the rights and safety of the traveling public along said highway.

That upon said 15th day of October, 1887, the said William Furrer, then in full life and health, was driving along said highway with a load of four-foot wood piled in ricks upon his wagon, seated upon the top of the same. When he approached and crossed said railroad crossing the wheels of his wagon struck said large blocks of stone in passing up said steep approach to the track in such manner that the wood upon his wagon was so jostled and loosened that,
7 when he passed down said steep incline or approach on the further side and struck the large stones thereon, the hinder part of the wagon being greatly elevated above the forward part, the wood thereon, without fault upon his part, was caused to slide forward upon his horses and so frightened and terrified them that, in spite of the endeavors of the said Furrer, they ran away, and by reason thereof and the falling of said wood the said William Furrer was thereupon thrown under the wheels of his wagon, and the same in crossing over him so crushed and mangled his head and body as to cause his immediate death. This intervening petitioner says that the proximate cause of the said accident and its

deplorable results was the gross negligence of the said receiver and his servants, as aforesaid, and is in no manner attributable to the fault of the said William Furrer. Said Wm. Furrer left surviving him and depending upon him for support his parents, Joseph Furrer and Annette Furrer, and his next of kin as follows, to wit, his sister, Mary Furrer, aged nineteen years, and two brothers, Joseph Furrer and Martin Furrer, aged respectively seventeen years and ten years.

Said sister and brothers were also dependent upon said Wm. for education and have been otherwise greatly injured by his death. Petitioner further says that at the time of said accident said William Furrer was a young man of good health and long expectancy of life, being only about 21 years of age, and that his premature death as aforesaid is of great damage to his said parents and next of kin, to wit, $10,000.00 (ten thousand dollars).

Wherefore this petitioner asks that he have leave to intervene and file this his petition, and that the court will make such order thereunder as law and equity may require for the purpose of ascertaining the amount of said damages and to provide proper compensation therefor.

By O. S. BRUMBACK,
*Solicitor for Intervening Petitioner.*

8 STATE OF OHIO, } *ss:*
*Lucas County,* }

Joseph Furrer, the intervening petitioner in above petition, being duly sworn, says that the matters and things set forth in the foregoing petition as of his own knowledge are true, and that all other matters and things therein stated are true to the best of his knowledge, belief, and information.

JOSEPH FURRER.

Sworn to and subscribed before me this 12th day of December, 1887.

A. P. CRANE, [SEAL.]
*Notary Public, Lucas Co., Ohio.*

And afterwards, to wit, on the 23rd day of January, A. D. 1888, the following answer was filed in this cause in said court, viz:

*Answer of Receiver.*

United States Circuit Court, Northern District of Ohio, Western Division.

THE AMERICAN LOAN AND TRUST CO., Plaintiff,
*vs.*
THE TOLEDO, COLUMBUS & SOUTHERN R'Y CO., Defendant.

Answer of Receiver, James M. Ferris, to Intervening Petition of Joseph Furrer, Adm'r.

James M. Ferris admits that he is the receiver of the Toledo, Columbus and Southern Railway Company, as in the intervening peti-

tion of Joseph Furrer, administrator, alleged, and as such receiver further admits that William Furrer suffered death by accident on the date in said intervening petition set forth and at or near the place therein set forth, and said receiver denies each and all the other allegations of the said intervening petition.

JAMES M. FERRIS, *Receiver.*
By A. W. SCOTT, *His Counsel.*

9 & 10 THE STATE OF OHIO, } *ss:*
*Lucas County,* }

Personally appeared James M. Ferris, who, being sworn, says that the facts set forth in his foregoing answer are true as he believes.

JAS. M. FERRIS.

Sworn to before me and subscribed in my presence this 23rd day of January, A. D. 1888.

C. A. CARLISLE,
[SEAL.] *Notary Public, Lucas Co., Ohio.*

11 *Master's Report on the Intervening Petition of Joseph Furrer, Admin'r, &c.*

In the Circuit Court of the United States, Northern District of Ohio, Western Division.

THE AMERICAN LOAN & TRUST COMPANY
*vs.*
THE TOLEDO, COLUMBUS & SOUTHERN RAILWAY COMPANY *et al.* } Equity. No. 495.

To the honorable the judges of the circuit court:

By an order made in the above case the undersigned was appointed a special master to hear the testimony and report what damages, if any, were justly due to the intervening petitioner, Joseph Furrer, as administrator of William Furrer, deceased.

Pursuant to said order I heard such testimony as the parties interested offered and arguments of counsel and submit my report as follows:

On the 15th day of October, 1887, the injury complained of in the intervening petition occurred, at a point on the avenue road, in Perrysburgh township, Lucas county, where that highway crosses the Toledo, Columbus, and Southern Railway, then and now being operated through a receiver duly appointed by this court. The facts relating to said injury are substantially as follows:

12 William Furrer, the son of the petitioner and aged about 21 years, was hauling cord-wood from the farm of Jacob Suter to his father's home, near the city of Toledo. The wood was cut in sticks three feet long and was loaded on a wagon having a wooden rack made specially for such purpose. This rack had six standard posts on each side. The wood was loaded in three tiers, lying length-

wise with the wagon and held in the rack by the standard posts, two on each side for each tier. The tiers, forward and rear, were loaded so that the ends of the wood at the front and rear rested on two sticks, or pillows, running across the rack or bed of the wagon. These cross-sticks raised the ends of the wood at the front of the wagon and at the end of it, so that the pieces would not easily slide forward onto the horses or backward out of the rack or wagon. The testimony shows that this was the usual way of loading cord-word for transportation by team and wagon, and that it was so loaded by petitioner and his son on the day in question. The petitioner and his son had been accustomed to hauling wood and he swears that with some years' experience he considered that the wagon carrying the wood at the time of the injury was properly loaded.

Having so loaded the wood, the petitioner's son undertook to drive the horses and transport the wood from the farm aforesaid to his father's home. He drove across the railroad track of the defendant, operated by the receiver as aforesaid, at the point named. The track at this point is higher than the public roadway, so that a wagon in crossing the railroad track makes an ascent in ap-
13 proaching and a descent after leaving the rails. The railroad track between the rails at the highway crossing was stone-ballasted and this ballast covered the highway a few feet on each side of the track. When the petitioner and his son approached this crossing the son was seated on the top of the front tier of cord-wood driving the horses. The father was following on foot immediately in rear of the wagon and holding onto it. The wagon made the ascent to the track safely, but as the descent from the track was begun, it is alleged, the front wheels jumped from the iron rail to the road so suddenly and then jolted over the stone ballast so roughly as to loosen the cord-wood and let it slide forward towards the horses. The horses frightened and moved faster, and the driver was thrown forward with the wood onto the tugs and whiffletree, and from there onto the road and under the wheels of the wagon, which, passing over his head, crushed it and caused almost instant death.

The testimony shows that the horses were quiet and safe, accustomed to such teaming, and that the young man who was killed was a careful driver, experienced in such work, and of exemplary habits.

The master made a personal inspection of the crossing and approaches. Planks were nailed down between the rails and on both sides of them and running parallel with them, as is usual at such places.

In order to determine whether the receiver was guilty of negligence in maintaining this crossing the master heard testi-
14 mony as to the nature of the traffic on the highway as to its former condition, and by consent of counsel and for his own satisfaction he made a personal inspection of it and of other crossings through the same section of country. The master was satisfied from said inspection that said crossing was not a dangerous one and was in passable condition. If it is proper and competent

to compare it with other highway crossings on the same road and through the same section of country, it can be fairly said to be a good average road crossing. The track had been ballasted, and some of the ballasting was on the highway, but the stones were broken to a fair size. One or two pieces of unreasonable size were produced, but the weight of testimony is that the stones in the roadway were of fair size and not dangerous to public travel. It was contended very earnestly in the argument that the fact that the accident happened at that point under the circumstances named is *prima facie* evidence of a bad crossing and of negligence; but the proof shows that many other teams loaded with wood and more cumbersome and unwieldy articles frequently passed over the same crossing without accident, which, on the same line of reasoning, would indicate that the crossing was reasonably safe for the ordinary traffic carried on over it. The same line of reasoning would lead to the conclusion that inasmuch as other parties frequently drove equally cumbersome loads over this crossing without accident that the driver in this case was not careful, or that his wood was not well loaded, or that he was sitting in an unsafe place on the wagon.

15 The road supervisor had sent a notice to the receiver that this crossing was not safe, but it is not established that he received such notice; on the contrary, there is evidence to show that he did not receive it.

There are other questions made in the argument which it is not necessary to pass upon in this report.

The deceased was a young man of industry, of excellent character, faithful to his parents, and of great service to his father, who is unfortunately disabled. The case is one of hardship, and if negligence could be imputed to the receiver damages of a substantial character have been proven.

The master, however, after a very careful examination of the crossing and country surrounding and after a very patient examination of all the authorities cited and of all the evidence, reports that the receiver was not guilty of negligence in maintaining the said crossing and is not liable for the injuries sustained. The master reports that said crossing, as established and maintained, was reasonably safe for the traffic passing over it and was not at the time of the injury in such an unsafe and dangerous condition as to have caused the injury complained of.

The master therefore reports that the petitioner is not entitled to damages in this proceeding and recommends that the claim be disallowed and the intervening petition be dismissed.

The master files herewith all the evidence taken, marked Exhibit A, and asks that the same be considered a part of this report.

All of which is respectfully submitted.

(Signed) A. J. RICKS,
*Special Master.*

16 And afterwards, to wit, on the 15th day of June, A. D. 1888, the following exceptions to report of special master *was* filed in this cause, to wit:

*Exceptions to Master's Report.*

United States Circuit Court, Northern District of Ohio, Western Division.

THE AMERICAN LOAN AND TRUST CO., Pl'ff't,
*vs.*
THE TOLEDO, COLUMBUS & SOUTHERN R. R. CO. *et al.*, Def'ts.
} Exceptions to Master's Report.

Now comes intervening petitioner, Joseph Furrer, administrator of William Furrer, deceased, and excepts to the report of the master on the intervening petition of this petitioner and the issues raised thereunder as follows, to wit:

1. Intervening petitioner excepts to the statement in the report that counsel for intervening petitioner consented in any manner to an examination or personal inspection by the master of any railroad crossing whatever except the (avenue) crossing in question.

2. Said petitioner excepts to any such finding as that from a "personal inspection of it (avenue crossing) and of other crossings through the same section of country the master was satisfied from said inspection that said crossing was not a dangerous one and was
17 in passable condition," and to the misconduct of the master in examining other crossings (than the avenue crossing).

3. Petitioner excepts to the finding in the report that said avenue crossing is a "good average road crossing" as compared with "other highway crossings on the same road and through the same section of country."

4. Petitioner excepts to finding upon the evidence that the ballasting and stones placed on the crossing and approaches thereto by defendant receiver "were broken to a fair size" and "not dangerous to public travel."

5. Exception is also made by petitioner to the finding that "many other teams loaded with wood and more cumbersome and unwieldly articles frequently passed over the same crossing without accident, which, on the same line of reasoning, would indicate that the crossing was reasonably safe for the ordinary traffic carried on over it."

6. Petitioner further excepts to the finding "that inasmuch as other parties frequently drove equally cumbersome loads over this crossing without accident that the driver in this case was not careful, or that his wood was not well loaded, or that he was sitting in an unsafe place on the wagon."

7. Exception is further made by the petitioner to the finding on the evidence that the receiver is not chargeable with express
18 notice that the crossing was not safe.

8. Petitioner excepts to the report as a whole and to the general finding therein that "said crossing as established and maintained was reasonably safe for the traffic passing over it and was not at the time of the injury in such an unsafe and dangerous condition as to have caused the injury complained of" upon the

ground that the same is not sustained by law or the evidence, and also excepts to the finding that this petitioner is not entitled to damages in this proceeding.

9. Petitioner further excepts to each part of the report above specified upon the ground that the same (as shown upon the face of the report) is based upon the nature of the general traffic over said crossing rather than the evidence relating to the particular event complained of, and founded upon the condition of other highway crossings in that section of the country rather than the evidence relative to the condition of the avenue crossing itself.

10. This intervening petitioner excepts to the evidence taken by the master upon behalf of the defendant at the hearing against the objection of this petitioner. Said evidence was incompetent, unfair, and prejudicial to him, seeking to make his case responsible for the condition of other railroad crossings than the one in question and making his case depend upon the action of others whose
19 safety in passing over said crossing was due (if this petitioner was entitled to go into same) to an entirely different set of circumstances from those entering into this case.

11. Petitioner excepts to the report as a whole and the conclusions therein upon the ground that the same is largely based upon the opinions of witnesses for whose testimony as experts no sort of foundation was laid.

12. Petitioner, for a final ground of exception to said report, says the findings therein are inconsistent with each other, as follows, to wit: The master first finds that Wm. Furrer was killed, as alleged in the petition, and no contributory negligence in fact upon his part, and then by a sort of extrajudicial argument proceeds to infer contributory negligence from evidence (?) not properly before him for that purpose.

Wherefore this petitioner asks that the said report may be set aside and a new hearing had, or that the court will reform said report and fix the amount of damages to which this petitioner is entitled, or empanel a jury for that purpose.

By O. S. BRUMBACK,
*Solicitor for Intervening Petitioner.*

20 And afterwards, to wit, on the 19th day of June, A. D. 1888, the following affidavit was filed in this cause in said court, viz:

*Affidavit of O. S. Brumback.*

United States Circuit Court, Northern District of Ohio, Western Division.

AMERICAN LOAN & TRUST COMPANY, Plaintiff,
*vs.*
THE TOLEDO, COLUMBUS & SOUTHERN R. R. Co. *et al.*, Defendants. } Affidavit.

STATE OF OHIO, *Lucas County*, } *ss:*

O. S. Brumback, being first duly sworn, makes oath and says that he is and was at the time of the hearing of the issues before the master hereinafter detailed solicitor for Joseph Furrer, administrator and intervening petitioner herein, and has been at all times since the filing of said Furrer's intervening petition the sole and only solicitor and counsel for said intervening petitioner.

Affiant further says that at no time has he ever consented or agreed, as such counsel or otherwise, that the master who heard and took the evidence upon the issues made upon said intervening petition, to wit, Capt. A. J. Ricks, should be allowed, have authority, or be authorized to personally inspect or examine any highway railroad crossing in Wood county, Ohio, or elsewhere, other than the
21 crossing upon the Toledo, Columbus and Southern railroad, commonly known as the "avenue crossing," and being the crossing made by the said railroad over the highway in Wood county, Ohio, commonly known as the "avenue road."

Affiant says he did consent to said master examining said crossing for the purpose of locating the same and its immediate surroundings and for no other purpose whatever.

O. S. BRUMBACK.

Sworn to and subscribed before me this 19th day of June, 1888.

A. D. STUART,
[SEAL.] *Notary Public, Lucas Co., Ohio.*

22 And afterwards, to wit, on the 29th day of June, A. D. 1888, the following proceedings were had in this cause in said court, viz:

*Confirmation of Master's Report, &c.*

United States Circuit Court, Northern District of Ohio, Western Division.

AMERICAN LOAN AND TRUST COMPANY, Pl'ff,
*vs.*
THE TOLEDO, COLUMBUS & SOUTHERN R. R. Co. *et al.*, Def'ts.

The issues raised under the intervening petition of Joseph Furrer,

administrator of the estate of William Furrer, deceased, and the answer of J. N. Ferris, receiver of defendants' railroad herein, coming on to be considered upon the master's report and evidence therein disclosed, as taken by him, together with the exceptions thereto of said Joseph Furrer, administrator, and affidavits in support thereof, the same having been argued by counsel, and the court, being fully advised in the premises, does find said exceptions to said report and evidence not well taken and does overrule and dismiss the same and does confirm said report of the master and the findings therein; and,

Wherefore, it is ordered, adjudged, and decreed that the said intervening petition of said Joseph Furrer, administrator, be, and the same is hereby, dismissed at the cost of said intervening pe-
23 titioner, taxed at $——, which said intervenor shall pay or execution issue thereon.

In which overruling and dismissal of said exceptions and confirmation of the master's report and decree dismissing said intervening petition said Joseph Furrer, administrator, did then and there, by his counsel, duly except.

Whereupon said intervening petitioner, by his solicitor, prays an appeal to the Supreme Court of the United States, which is allowed, and bond to be given on said appeal is fixed at $100; pending which appeal and the final disposal of said intervening petition it is ordered that if the funds in the hands of the receiver herein appointed should become exhausted or the said receivership discharged and the property in his hands sold or redelivered the purchasers or acceptors thereof shall take the same subject to all claims, decrees, or judgments which the said Joseph Furrer, administrator, may ultimately recover herein, if any.

24 Afterwards, to wit, on the second day of June, A. D. 1888, there was filed in the clerk's office of said court the following testimony, which is marked Exhibit "A" to report of special master:

In the Circuit Court of the United States for the Northern District of Ohio, Western Division.

THE AMERICAN LOAN AND TRUST COMPANY, Plaintiff,
*vs.*
THE TOLEDO, COLUMBUS & SOUTHERN RAILWAY COMPANY *et al.*, Defendants.

*Testimony Taken before A. J. Ricks, Esq., Special Master.*

TOLEDO, OHIO, *February* 2, 1888.

The intervening petitioner, Joseph Furrer, to maintain the issues on his behalf on the hearing on the issues made upon his petition, called as a witness H. R. CHARLES, who, first being duly sworn, testified as follows:

Direct examination by Mr. BRUMBACK:

Q. State your business.
A. I teach school in the winter and garden summers.
Q. Do you know the supervisor of Perrysburgh township, Wood county, Ohio?
A. There are three. I know the supervisor of district No. 1.
Q. Is that the one near avenue road crossing of the Toledo, Columbus and Southern railroad?
A. Yes, sir.
Q. What is the name of the supervisor of that district?
A. Henry Hold.
25 Q. State whether you wrote any letters for Mr. Hold in the fall of 1887.
A. I did.
Q. State the character of that letter.
A. I was out that time at Perrysburgh, and he came to my house, and he said——

(The receiver, by his counsel, Mr. Doyle, objected to the witness stating the contents of said letter.)
(Mr. Brumback exhibited service of notice upon counsel for receiver to produce the letter or postal card in question, and stated that the same had not been furnished.)
(The objection was overruled by the master.)

The MASTER:

Q. State the contents of that letter as near as you can.
A. I think I headed the letter to the railroad company—to the T., I. & S. Railroad Company—and then I says——

Mr. BRUMBACK:

Q. To the "T., I. & S." or the T., C. & S.?
A. Whatever the name of the company was. I found out I had the right name of the company at that time.

Mr. DOYLE:

Q. To whom did you address the letter?
A. To the railroad company, in Toledo.

Mr. DOYLE: Then I object to the contents being stated.
The MASTER: We will hear it, subject to their proving that the letter did get to the hands of the receiver.

Mr. BRUMBACK:

Q. Tell what you wrote in the letter.
A. These words, as near as I can state them: "You are
26 hereby notified that the avenue crossing of the T., C. & S."—or whatever the road was; I know I had it right then, because I had the papers there giving the name of the company—"is in a bad condition;" and then I signed Mr. Hold's name to it as supervisor of Perrysburgh township, Wood county, Ohio.

Q. In bad condition, you said?
A. Yes, sir.
Q. At whose request did you write this letter?
A. Henry Hold's, the supervisor.
Q. What was done with the letter after you wrote it?
A. I gave it to Mr. Hold.
Q. How did you direct this letter on the face of it?
A. I am pretty sure I directed it to the T., I. & S. Railroad Company, Toledo, Ohio.
Q. Was it the T., I. & S., or what were the letters you used?
A. I think it was just the initials instead of writing the full name.
Q. Are you sure of the special letters?
A. I put on whatever he told me to, and he lives along the road and had an interest in it. I, of course, was not posted on the road at all, and he told me the initials, and whatever they were I put them on.

Cross-examination by Mr. DOYLE:

Q. When was this?
A. I think it was in the month of September—I ain't sure—of last year.
Q. Where was it?
A. It was at my house, in Perrysburg.
Q. That was on a postal card, was it?
A. I am pretty sure it was. I never thought of the matter until within two or three weeks.
27 Q. Did he bring the postal card to your house?
A. He brought the paper or postal card, whatever it was.
Q. You can't remember whether it was a paper or a postal card?
A. I couldn't swe . to it; no, sir. I did his writing in English, and have for eight years.
Q. Do you remember putting an envelope on it?
A. No, sir; I don't remember.
Q. Don't remember putting a stamp on it?
A. I do not.
Q. Where does Mr. Hold live?
A. He lives about four miles in a northerly direction, down what they call the avenue road from Perrysburgh, and then a mile south.
Q. Did he take the letter with him when he went away?
A. Yes, sir.
Q. You don't know what he did with it, of course?
A. No.
Q. And this you say was in September?
A. I think it was in September.
Q. Your address on the letter was just the initials, whatever they were?
A. Of the railroad company; I am not sure whether I wrote the words out or just the initials.
Q. You said a moment ago you thought you put on the initials?
A. I think so, but I am not sure. I couldn't swear to it.
Q. Where did you direct it to?

A. Toledo, Ohio—Lucas county.
Q. Who put the county on, did you?
A. Yes, sir.
Q. You stated simply in the letter, as I understood it, that the avenue crossing is in a bad condition?
A. Yes.
Q. And that is all?
A. That is all that I remember.

28 The intervening petitioner, further to maintain the issues on his part, called as a witness HENRY HOLD, who, being duly sworn, testified as follows:

Direct examination by Mr. BRUMBACK:

Q. Where do you live?
A. I live in Perrysburgh township.
Q. What office, if any, did you hold there?
A. Supervisor.
Q. That is of the road district?
A. Number one.
Q. That is where the avenue crossing is?
A. Yes, sir.
Q. The avenue crossing is a crossing of the road in your district—of the Toledo, Columbus & Southern railroad?
A. Yes, sir.
Q. Were you the supervisor of that district during last fall?
A. Yes, sir.
Q. How long have you been supervisor?
A. I have been supervisor now—this is the fourth year.
Q. I believe you are a German?
A. Yes, sir.
Q. Do you write English?
A. No, sir.
Q. Who does your writing for you?
A. Hi. Charles.
Q. Did you get him to write any letters for you during the fall?
A. Yes, sir; I got him last fall, about September, somewheres around.
Q. What was it you got him to write?
A. I got him—some one told me about that avenue crossing, that it was bad, and I told the section boss——

Mr. DOYLE:

Q. Who was it?
A. I don't know his name. It was section No. one on the Toledo, Columbus and Southern railroad.

Mr. BRUMBACK:

Q. The section boss through your district?
29 A. Yes, sir; of the same district.
Q. What did you tell him?

A. I told him he should fix that crossing a little better than it was. He told me had nothing to do with it; that I had to see the roadmaster that oversees the road, or the company.

Q. What did you do then?

A. I went then into Perrysburgh and Mr. Charles wrote the postal card to the Toledo, Columbus and Southern railroad.

Q. Do you know what he wrote?

A. Yes, sir; I told him what to write.

Q. State what you told him to write.

(Objected to by the receiver, by his counsel. Objection overruled; to which the receiver then and there excepted, by his counsel.)

A. I told him he should write to the company that the avenue road crossing was in a bad shape, and that they should fix it when they could.

Q. Who did you tell him to direct it to?

A. To the Toledo, Columbus & Southern railroad, at Toledo, Ohio.

Q. When was this?

A. September.

Cross-examination by Mr. DOYLE:

Q. Who was the section boss that you notified?

A. I don't know his name.

Q. What kind of a looking man is he?

A. Kind of short, chunked man.

Q. Where does he live?

A. Right there at the junction with the T., C. & S., where it runs into the Ohio Central. He keeps a boarding-house.

Q. That is the man you notified?

A. Yes.

Q. The man who keeps a boarding-house at the junction of the Ohio Central and the T., C. & S.?

A. Yes.

30 Q. He told you he hadn't anything to do with it; that you must notify the company?

A. Yes; I had notified the company once before.

Q. Then you told Mr. Charles to write you a postal card to the company?

A. Yes.

Q. And was that a postal card?

A. Yes, sir.

Q. Did you bring it there to him?

A. No; I dropped it here.

Q. No, no; but did you bring the postal card to Charles' house?

A. Yes, sir.

Mr. BRUMBACK:

Q. What did you do with the card?

A. I went the next day to Toledo and dropped it in the mail box on the corner of Bridge street and Front street—I believe it is—on the lamp post.

Mr. DOYLE:

Q. And that was the next day, was it?
A. Yes, sir; the next day.

The intervening petitioner, further to maintain the issues on his part, called as a witness HENRY SUTER, who, being duly sworn, testified as follows:

Direct examination by Mr. BRUMBACK:

Q. Where do you live?
A. A half a mile from Moline station, on the Ohio Central.
Q. How far is that from the avenue crossing on the T., C. & S.?
A. About two miles and a half.
Q. Do you know Joseph Furrer?
A. I have not known him before he got the wood.
Q. What wood?
A. Cord wood.
31 Q. Did you know his son, William Furrer?
A. Well, I knowed him when he was there.
Q. Did Joseph and his son William come to your house and get some wood last fall at your farm?
A. Yes; they come to the other. We got two farms. They didn't come down home.
Q. They came up to where your father owns a piece of land there, didn't they?
A. Yes, sir.
Q. What time was that?
A. I don't remember.
Q. Was it in September or October of the fall?
A. Yes, sir.
Q. How many times did they come there after wood—the two together?
A. Once.
Q. What kind of wood did they get?
A. Soft wood—four foot long.
Q. Did you help to load the wood?
A. Yes, sir; the hind tier.
Q. How was it put on the wagon?
A. There was a cord.
Q. How many tiers was there on the wagon?
A. Three.
Q. State how you loaded the wood on the back and front end—how it was put on.
A. With a stick under each end—under the wood—and the wood was laid on top.
Q. Went in under the wood?
A. Below—right by the rack under the wood.
Q. That would pitch the wood in a little to the center, wouldn't it?
A. Yes.
Q. Tell how these stocks were put under each end of the wood, each end of the rack—how they were laid.

A. They were laid crossways.
Q. Crossways of what?
A. Of the rack, and the wood crossed lengthways in the rack and the cross went over the stick.
Q. How many of these sticks were put in on the rack crossways?
A. Two; one behind and one in front.
32 Q. How far from each end?
A. About six inches.
Q. What kind of wood was this—split wood or round sticks?
A. Most of it was split.
Q. How was it loaded on the rack? I mean, how did you pile it on?
A. It was piled on solid.
Q. Had you ever loaded any other wood?
A. Yes.
Q. How long have you loaded wood?
A. Since I have drove team.
Q. How did the way this was put on compare with the way it was generally put on wagons when you have done it and seen it done?
A. To the best of my opinion, it was just like any other wood.
Q. In your opinion, loaded like it is always loaded?
A. Yes, sir.

Cross-examination by Mr. DOYLE:

Q. You never saw these people before that day?
A. No, sir.
Q. What kind of a rack did they have?
A. An open rack.
Q. An ordinary wood rack?
A. Yes, sir; it was a pretty good rack.
Q. How far from your house was it that you loaded the wood?
A. Two miles and a half where they loaded the wood.
Q. How far from where you lived did you load the wood?
A. A mile and a half.
Q. How far was it from the avenue crossing that you loaded the wood?
A. Two miles and a half.
Q. What time of day was it?
A. About 1 or 2 o'clock in the afternoon; some time around there.
Q. In the middle of the day?
A. Yes, sir; in the afternoon.
Q. What kind of a day was it?
A. A bright day.
33 Q. The roads were dry?
A. Yes, sir.
Q. And the weather was dry?
A. Yes, sir.
Q. These men could see pretty well, couldn't they?
A. I expect they could.

Q. Both of them were along, were they—father and son?
A. Yes, sir.
Q. Did they both go away together?
A. Yes, sir.
Q. On the wagon?
A. No, sir.
Q. Who drove the team?
A. Will. Furrer.
Q. That is, the young man?
A. Yes, sir.
Q. Where did the old gentleman go?
A. He walked part of the way through the lane.
Q. They left there together?
A. Yes, sir.
Q. And he was walking?
A. Yes, sir.
Q. That is all you saw of them?
A. Yes, sir.
Q. That is all you know about it?
A. Yes, sir.

The intervening petitioner, further to maintain the issues on his part, called as a witness J. W. SUTER, who, first being duly sworn, testified as follows:

Direct examination by Mr. BRUMBACK:

Q. Are you the brother of Henry Suter?
A. Yes, sir.
Q. And live in the same place?
A. Yes, sir.
Q. Do you remember Joseph Furrer and his son William coming to your land to get some four-foot wood last fall?
A. Yes, sir.
Q. What time was it when they came there after wood?
A. About two o'clock.
Q. What month?
A. I couldn't tell just what month.
34 Q. Was it in the fall?
A. Just about husking-corn time.
Q. Did they get some wood there?
A. Yes, sir; four-foot wood.
Q. How many racks did they have on the wagon?
A. One.
Q. I mean tiers.
A. Three tiers.
Q. Tell how the wood was piled on the rack.
A. There was sticks at the end, a cross-piece at the bottom, and the first tier was laid in, and then he put in the second tier, and then put on a cross-piece and put in the third tier.
Q. Were there standards on the side of the rack?
A. Yes, sir.

Q. How much wood was put on?
A. About a cord, in my judgment.
Q. Did you see it loaded?
A. Yes, sir.
Q. There were sticks put under the wood, were there?
A. Yes, sir.
Q. Where were the sticks put on the rack?
A. At the bottom, at each end, so that the wood would lay up a little, so as to keep it from slipping out.
Q. That is, endwise?
A. Yes, sir.
Q. How was the wood piled on as regards to being tightly or loosely piled?
A. It was piled pretty solid.

(No cross-examination.)

The intervening petitioner, further to maintain the issues on his part, called as a witness HENRY WESEMANN, who, first being duly sworn, testified as follows:

Direct examination by Mr. BRUMBACK:

Q. Where do you live?
A. On the Mandle road.
Q. That is in Perrysburgh township, Wood county, Ohio?
35 A. Yes.
Q. How far is that from the avenue crossing of the Toledo, Columbus & Southern road?
A. About three miles.
Q. Did you pass along the avenue road crossing, the Toledo, Columbus & Southern crossing, on or about October 15 of last year?
A. Yes, sir.
Q. Did you see Joseph Furrer there that day?
A. Yes, sir.
Q. Who was with him?
A. His boy William.
Q. What were they doing?
A. Hauling wood.
Q. How far was it from the railroad crossing on the avenue road that you met them?
A. I don't know how far it was. It wasn't only a little ways. It might have been eight or ten rods.
Q. Which direction from the crossing?
A. On the east side.
Q. East of the crossing?
A. Yes, sir.
Q. Did they have wood on their wagon?
A. Yes.
Q. What kind of wood?
A. Soft wood—elm and black ash.
Q. How long?
A. Four-foot wood.

Q. How was it piled?
A. I thought it was piled on nice; the ends looked square, as near as I could see.
Q. Who was on the load?
A. The boy.
Q. Was there any evidence of the wood being loose, or loosening, or shaking around, or anything of that kind?
A. No, sir; there wasn't.

Cross-examination by Mr. DOYLE:

Q. Was the old gentleman with the boy?
A. Yes; he was behind the load.
36 Q. And the boy was on the load?
A. Yes, sir.
Q. And this was east of the crossing eight or ten rods?
A. Yes, sir.
Q. What time of the day was it?
A. About four o'clock in the evening.
Q. Was it broad daylight?
A. Yes.
Q. The roads were dry?
A. Yes.

Mr. BRUMBACK:

Q. Did there an accident happen shortly after you saw the Furrers going along there?
A. Yes; right after they crossed the railroad.

Mr. DOYLE:

Q. You didn't see it?
A. No, sir.

The intervening petitioner, further to maintain the issues on his part, called as a witness HENRY LAUMANN, who, first being duly sworn, testified as follows:

Direct examination by Mr. BRUMBACK:

Q. Where do you live?
A. Perrysburgh township, Wood Co., Ohio.
Q. Were you at or near the avenue crossing of the Toledo, Columbus & Southern railroad about the 15th day of October, 1887?
A. Yes, sir.
Q. Did you see Joseph Furrer there that day?
A. Yes, sir.
Q. Where were you when you saw Furrer?
A. I was sitting on the platform of the railroad.
Q. Who was with Mr. Furrer?
A. His boy, William.
Q. Were you sitting there when they came up?
A. I was sitting there when they came up with the load.
37 Q. What kind of a load?

A. It was cord wood, four feet.
Q. Where was the boy?
A. He was on top of the load of wood, on the front tier.
Q. Where was the father, Joseph?
A. Right behind the wagon, and had hold of the board—walking.
Q. What next did you see when they came up to the crossing? Go on and tell what occurred.
A. They came up to the crossing. The horses had to pull pretty good—a pretty stiff pull to pull up. The horses came up onto the crossing. The boy spoke, "whoa," just as the horses went down the grade. Just then the wood fell off in front and the boy fell off.
Q. You say the horses were pulling pretty strong to come up on the track—the crossing?
A. Yes.
Q. How fast did the wagon go in going down the other side?
A. Going down the other side it went pretty fast.
Q. Went pretty fast?
A. Yes; because Mr. Furrer had to let go of the board. He trotted first and then he had to let go of the board.
Q. He couldn't keep up with the wagon, then, behind?
A. He couldn't; no, sir.
Q. You say when the horses started down rapidly in this manner the boy said "whoa"?
A. The boy said "whoa" just as quick as the horses went down the grade.
Q. As they started down in that fast manner?
A. Yes.
Q. What did the wood do then?
A. It tumbled.
Q. What part of the wood fell?
A. The front tier.
Q. Which way did it fall?
A. Forwards.
Q. Forwards?
A. Yes.
Q. How much of it fell?
A. It fell enough to let the boy down with it.
38 Q. The boy and some of the front tier fell forward, did it?
A. Yes.
Q. They both went together?
A. Yes.
Q. Did the wood strike the horses?
A. That is more than I can tell.
Q. What did the horses do then?
A. They run.
Q. Where did the boy lay?
A. The boy laid on the tugs at first.
Q. Between the wagon and horses?
A. Yes.
Q. How long did he stay there?
A. Only a little bit; somehow or another he got off.

Q. How far did he go before he fell off of the tugs?
A. Well, sir; I don't know just how far; about a hundred feet or so.
Q. There is a bridge along there?
A. Yes.
Q. How close to the bridge was it that the boy fell off?
A. Pretty close to the bridge.
Q. On which side of the bridge?
A. On the east side of the bridge.
Q. Did any wood fall off from the front tier after it first commenced to fall?
A. Yes.
Q. Where did it fall along the road there before the boy fell?
A. The boy fell right with the wood.
Q. I know—at first—but was there any wood fell off afterwards, of the front tier?
A. It fell right in front off, and the boy was lying on the tugs first.
Q. Did the wood continue falling?
A. Yes.
Q. Did any of it go down to where the boy was lying on the tugs, that you saw—did it fall on him?
A. No, sir.
39 Q. What happened when the boy fell off of the tugs?
A. The hind wheel struck him.
Q. Where?
A. Right here in the forehead.
Q. Struck him in his head?
A. Yes.
Q. What did you do?
A. I went over to Crep's house and got some water to wash the wound.
Q. Did you go to the boy first, before you went over there?
A. No, sir; I seen the boy there and went right over and got some water to wash the wound. I didn't look about the horses at all.
Q. Did you stop to see the boy before you went?
A. Yes; I stopped to see the boy before I went, but I went right over afterwards.
Q. What condition did you find the boy's head in when you looked at him?
A. It was pretty badly bruised—his forehead.
Q. Was he bleeding?
A. Yes; out of his mouth and nose and out of the wound.
Q. How long did he live after you got to him?
A. He only breathed a couple of times—a few moments.
Q. What kind of a crossing is that avenue crossing—or was it at that time—describe it.
A. It pulls pretty hard and it was a rough crossing and it went down kind of oblique—catering—didn't go down straight.
Q. How steep is it?
A. That is more than I could just tell.

Q. Give us some idea how steep it was with your hand, running down from the track?

A. It went pretty steep down—enough so that the wood fell, and it was rough.

40 Q. What made it rough?

A. There was so many stones lying in the track.

Q. What kind of stones were these?

A. Limestones from the stone quarry up there, I suppose.

Q. What was the road ballasted with along there?

A. Limestone.

Q. Were these stones that you saw in the crossing, in the wagon track, the same kind of stones that the road was ballasted with?

A. Yes, sir.

Q. How large were the stones that you saw lying in the wagon track? Give some idea how large they were, as near as you can.

A. I will tell you, I don't want to tell nothing but the truth.

Q. Give us something of an idea of what you saw there—how large the stones were that you noticed.

A. Well, they was too large, anyway, to be on the road.

The MASTER:

Q. How would they compare with your fist?

A. They were bigger than my fist.

Mr. BRUMBACK:

Q. Were they lying where a wagon would pass over them?

A. Yes, sir.

The MASTER: How far from the track did they extend down into the roadway?

A. Them stones?

Q. Yes.

A. They were about a rod—no, they wasn't quite a rod, them stones wasn't; them stones was right close by the track.

Mr. BRUMBACK:

Q. On which side?

A. On each side.

41 Q. Do you know who put those stones there along the railroad?

A. No; I don't.

Q. Or when it was done?

A. No; I don't.

The MASTER:

Q. How many stones were there in the road there?

A. I don't know.

Q. A large number or only a few?

A. Well, there was quite a few; of course, I couldn't tell just how many.

Mr. BRUMBACK:

Q. Did any of the other wood fall off excepting the front tier?
A. Not that I seen.
Q. Was it on the west side that the wood fell?
A. Yes.
Q. How far from the track was it that the wood fell?
A. It was on the company's land yet—right close to the track—just as quick as it went down. I couldn't see how many feet, but close by.
Q. Close to the track?
A. Yes.
Q. Have you ever hauled any four-foot wood?
A. Yes.
Q. How long have you been hauling four-foot wood?
A. A couple of years.
Q. Loaded it yourself?
A. Yes.
Q. Hauled it yourself?
A. Yes.
Q. Do you think you are capable of telling what would cause wood to fall forward in the manner it did there?
A. Yes.
Q. What would you say, in your opinion, it was that caused the wood to pitch forward at that place?

(Objected to by the receiver, by his counsel.)

The MASTER: We will hear it subject to your exception.

(The receiver, by his counsel, then and there excepted.)

42 Mr. BRUMBACK:

Q. What caused the wood to pitch forward there among the horses?
A. The steep grade and the rough track in the wagon road.
Q. When the boy came up to the crossing how fast was he driving when you first saw him?
A. Just driving a common gait—a slow walk.
Q. When did the wagon start to go rapidly?
A. When the forward wheel went down and the hind wheel struck the railing.

Cross-examination by Mr. DOYLE:

Q. It didn't go up the grade fast?
A. No.
Q. He didn't start his horses up so as to go up the grade rapidly?
A. No, sir.
Q. He went up very slow?
A. Yes.
Q. Didn't give his horses any extra speed at all?
A. He drove his horses right along; he didn't run them up.

Q. He didn't increase their speed at all before he got to the grade?
A. No, sir.
Q. You said it was a hard pull to get up there?
A. Yes.
Q. Did you see these men that day before?
A. Yes.
Q. When was that?
A. I knowed Mr. Furrer for eight years.
Q. Had you seen them that day before?
A. No, sir.
Q. Where did they live?
A. Right in Wood county, along the Mandel road.
Q. How near to the avenue crossing?
A. About two miles and a half.
43 Q. You hadn't seen them cross over that crossing before that day?
A. No, sir; not that day.
Q. How many times have you seen that crossing there while it was in that condition?

Mr. BRUMBACK: Before the accident.
WITNESS: Well, I have not traveled that road very often.

Mr. DOYLE:

Q. Was that the first time you were there?
A. It was the second time I was there since they ballasted the road with stone.
Q. When was the first time?
A. The first time was about a month before.
Q. How long before that was the ballasting done?
A. I couldn't say.
Q. It was ballasted the first time you saw it?
A. Yes.
Q. How far was the track above the grade of the road?
A. That is more than I could tell.
Q. You may tell whether it was a hundred feet or not.
A. It ain't a hundred feet.
Q. About how high is the track there above the road?
A. I couldn't tell you because I don't want to give no evidence that I ain't sure of.
Q. Was it two feet?
A. Yes; more than that.
Q. Three feet?
A. Well, as near as I can tell, it was, anyway, all of three feet.
Q. And the road there is ballasted with stone?
A. Yes.
Q. And the stones which were in the roadway were the same kind of stones they used for ballast?
A. Yes.

Q. And these stones extended out over the road 8 or 10
44 feet? You said less than a rod, didn't you? These stones were in the road from the track, each way, how far?

A. Well, why, yes; about 8 or 10 feet—something like that.

Q. Is it a covering on the roadway or just a few scattered stones?

A. It was covered some, but there was big stones lying on top, which was loose.

Q. Was it put on as a dressing on the road—as a finish for the road?

A. Yes.

Q. The earth that was put up there when the road was ballasted was pretty soft, was it not?

A. It wasn't very soft then.

Q. When it was put on there it was soft——

Mr. BRUMBACK:

Q. Did you see the ballasting put on?

A. No, sir.

Mr. DOYLE:

Q. The road, some time or other, was graded up to the track?

A. I suppose so; I wasn't there before.

Q. You were there once before, you said?

A. Once before, but not before it was ballasted.

Q. You were there once after it was ballasted up?

A. I said not before it was ballasted up.

Q. Was this road in the same condition when you saw it and looked at it before as it was that day?

A. I couldn't say that for sure.

Q. Did you notice any difference in it?

A. There wasn't very much difference in it.

Q. It was about the same?

A. Yes.

Q. How many of these stones did you see there which were bigger than your fist?

A. I didn't count them.

Q. Did you see more than one?

A. Yes.

Q. How many more?

A. I couldn't tell.

45 Q. You may state whether there were a great many or just a few. There was a dressing of stone put over the road, wasn't there?

A. Yes; some was dressed pretty big, though.

Q. How many of these large stones did you see there?

A. I told you I didn't count them.

Q. Did the wheels of the wagon hit any of those large stones?

A. Yes.

Q. When?

A. When it went down the grade.

Q. That you saw?

A. Yes, sir.

Q. You say you saw the wheels of the wagon hit one of those large stones. Did you see the wheels of that wagon hit any of those large stones?

A. The wheel hit some stones——

Q. Did you see the wheels of that wagon hit any of those large stones?

A. I didn't just really see that wheel——

Q. You didn't see that. What was it first attracted your attention to the road? Did you see the wood when it commenced to fall?

A. My first attention was—the wood began to fall.

Q. Did you see the wood when it began to fall?

A. Yes; I did.

Q. You were looking right at it, were you?

A. Yes.

Q. When it commenced to fall?

A. Yes.

Q. You saw it when it did commence to fall?

A. Yes.

Q. Then you couldn't have seen the wheels strike anything at the same time. You were not looking at the wheel?

A. I was looking at the wagon.

Q. You were not looking at the wheel. Was there a stone in the wheel track at all?

A. Yes, sir; there was.

Q. Did you see it?

A. I saw it after the wagon went by there.

Q. How big was it?

A. Well, it was bigger than my fist.

46 Q. Was that what caused the accident?

A. That accident?

Q. Yes.

A. I couldn't swear to that.

Q. How many of those did you see bigger than your fist in the wheel track?

A. I didn't count them. I seen only a few there.

Q. In the wheel track?

A. Yes.

Q. Were there three?

A. Well, I didn't count them.

Q. If you are able to say that there were stones in the wheel track you are able to say whether there was one or two or three?

A. No I haint.

Q. Then you don't know anything about it?

A. Yes, sir; I do. I was there.

Q. How many did you see of the stones in the wheel track?

A. I couldn't tell you.

Q. Did you see two?

A. I don't know how many there was, I tell you.

Q. Did you see one?

A. Yes, sir; I did.
Q. That was right in the wheel track, was it?
A. How many more I couldn't say.
Q. You know one?
A. Yes.
Q. You don't know of any more?
A. There was more, but I don't know how many more.
Q. Was there two more?
A. I don't know.
Q. Were those stones in the track so that the wheels hit them?
A. Yes.
Q. How many of them did the wheel hit?
A. I told you that I didn't count them.
Q. It couldn't hit but one at a time, certainly, could it?
A. Not very well.
Q. What was it that caused the accident, if you know anything about it?
A. I ain't a judge.
47 Q. When you first saw the wood falling the boy fell down with it?
A. Yes.
Q. Onto the tugs?
A. Yes.
Q. How far was that from the track itself—from the iron on the railroad—where the wood commenced to fall?
A. It was inside of the road where the wood commenced to fall.
Q. Was the hind wheels of the wagon off of the railroad track?
A. No, sir; as the hind wheel struck the iron the wood commenced to fall.
Q. The hind wheel struck the rail—the iron—when the wood commenced to fall?
A. Yes, and the front wheel went down the grade.
Q. So that when the wood commenced to fall the wagon was not over the track entirely?
A. No, sir; it was just going down.
Q. How far was it from where the boy fell off from the tugs onto the ground?
A. About a hundred feet; that is what I think it is. Of course, I didn't measure it.
Q. The horses commenced to run away when the wood fell?
A. Yes; they commenced to run.
Q. Where was the father then?
A. The father was behind the wagon—had hold of the board when the horses started.
Q. When was it he let go of the board?
A. The wagon went down the grade so fast he couldn't——
Q. It was after the horses commenced to run away he let go?
A. Yes; he held onto the board as long as he could.
Q. And it was after the wood commenced to fall, and the wagon went down the grade so fast he had to let go?
A. Yes.

Q. There was no speed up to the time that the wood fell off that made him let go?

A. Why, no; the horses didn't run until the wood commenced to fall.

48 Q. There was no speed until the wood struck the horses and started them up?

A. No, sir.

Q. And that is when they commenced running away, and not before that?

A. Yes, sir.

Q. How far from the railroad track is it to where the road becomes level again—that is, how far is this steep grade that you have been talking about?

A. I don't know.

Q. Is it fifty feet?

A. It is going down grade all the way clear to the bridge from the railroad.

Q. Is it a gradual incline all the way down to the bridge?

A. From the bridge up gradually this way, towards the railroad, but right there at the railroad it goes steep down.

Q. How far?

A. I couldn't say just how far, because I didn't measure it.

Q. Is it the same on both sides? Is it as steep on the east side as it is on the west side?

A. No, sir.

Q. Which is the steepest?

A. On the west side.

Q. Because that is going down hill?

A. Yes.

Q. Going east you are going up hill?

A. Yes.

Q. He was coming down hill when he was coming towards the railroad, when he brought this load of wood—that is, there was a down grade all the way towards the bridge?

A. It is down water level along the road close to the railroad.

Q. Pretty nearly level?

A. Yes.

Q. But then the grade there is a down grade?

A. Yes.

Q. Between the railroad and the bridge it is a little steeper than it is on the other side?

A. Yes.

Q. You go down towards the bridge?

A. Yes; from the railroad.

Q. Were there ruts in the track—in the roadway—made by wheels—wagon ruts?

A. No, sir.

Q. Nothing of that kind?

A. No, sir.

49 Q. There was no deep cut made by the wheels of the wagons on the crossing on either side on the road?

A. The wagon road?

Q. I mean on either side of the track on the crossing?

A. There was no ruts there made by wagon wheels.

Q. It was smooth with the exception that these stones were scattered about?

A. That is all.

Q. I would like to have you give me your judgment how far this grade extended on either side of the track?

A. I couldn't do that.

Q. Do you know how wide the right of way of the railroad is there?

A. I don't know.

Q. Was there a fence on either side?

A. I think so.

Q. You don't know the distance between the fences?

A. No.

Q. Did this grade extend out as far as the fence on either side?

A. That is more than I could tell. I wouldn't swear to no lie, as far as that is concerned. I wouldn't swear to no lie.

Q. When was it that the boy said "whoa?"

A. Just as the horses went down the grade.

Q. There was no place that the wheels jumped off of. It was gradual from the track down, was it not?

A. It jumped a little off from the track.

Q. There is plank between the rails?

A. Yes.

Q. What was there on the crossing in between the rails?

A. There is plank there now.

Q. Well, then?

A. That is more than I can tell.

Q. You can't remember whether the plank was there or not?

A. No, sir; I couldn't.

50 Q. Well, now, the wood didn't commence to tumble off just as soon as the front wheel left the track? You say it was about a rod from there, or just as the hind wheel struck the iron, that the wood commenced to tumble off; is that right?

A. The front wheel was on the grade and the hind wheel struck the last iron.

Q. That is the iron that the front wheel had already gone over and the iron nearest to the horses?

A. Yes.

Q. So that the front wheel was the distance from the iron that the wagon was long between the wheels when the wood commenced to fall off; the hind wheel was against the rail—next to the horses?

A. Yes.

Q. So that the front wheel was just that much further than the length between the wheels?

A. Yes.

Q. It wasn't because of any jolt made by the front wheel going over that threw the wood off?

A. It was the jolt going down grade.

Q. You said there were stones in the wagon road?
A. Yes.
Q. And in the wheel track?
A. Yes.
Q. How far did you notice any of those stones from the track?
A. I don't know.
Q. About where the front wheel would be?
A. To tell you the truth about it, I was a little excited.
Q. You were not excited until after it happened?
A. No; but just as soon as the horses started I started too.
Q. Ain't that the first that you took particular notice—when the horses started?
A. The wagon was going pretty rough and the wood began to fall and the horses began to run, and then, of course, I took more notice.
Q. You were sitting on the platform?
A. Yes.
Q. Where is that platform?
A. Right on the north side of the avenue road and on the west side of the railroad track.
51 Q. When you sat on the platform, how far was this wagon from you when the wood commenced to fall?
A. Right close by me.
Q. After the accident was over did you go back to look for these stones?
A. After the accident was over there was a train come. I looked at the road a little to see how it was there, but the train come and I flagged the train and went to Toledo. I was waiting for the train, me and my wife.
Q. Did you look at that road to see whether there were stones there, or to see what caused the accident?
A. No; I didn't examine the road.
Q. Did you examine the road to see if these stones were there?
A. I looked and seen them stones there.
Q. After the accident?
A. Yes; after the accident and before the accident.
Q. You noticed them before the accident and after the accident, too?
A. Yes, sir.
Q. So that you know they were there?
A. Yes.
Q. You know they were in the wagon track?
A. Yes.
Q. You know these wheels must have gone over them?
A. They couldn't help themselves.
Q. You can't say there were over three stones there?
A. I wouldn't say.
Q. Was there anybody there with you besides yourself?
A. Me and my wife.
Q. You were waiting to flag this train?
A. Yes.

Q. When the train came along you took the train and went away?
A. Yes; I went to Toledo.

Re-examination:

Q. Your wife was there; what is her full name?
A. Sarah Laumann.
Q. Did you bring in that certificate (doctor's certificate of wife's illness) this morning?
A. Yes.
52 Q. You say you didn't notice how many stones were there; that there were quite a few, but you didn't take the pains to count them?
A. No, sir.
Q. You merely noticed that there were stones there, and that they were as large as you said?
A. Yes, sir.
Q. Before the boy said "whoa," did you have your attention called to the wagon? were you watching the wagon before the boy spoke, or not?
A. No, sir; I was watching his father, and I seen the boy sitting there, too.
Q. Upon the front of the rack, was he?
A. Yes, sir.
Q. You didn't notice the boy until he said "whoa"?
A. Of course.
Q. Which side of the platform were you sitting on?
A. I was sitting on the north side—or on the east side—and my wife was sitting on the west side of the railroad.
Q. Which way were you facing?
A. South, towards the wagon road.
Q. Then, when the wagon came up, it came right up in front of you, did it?
A. Certainly.
Q. When the boy first said "whoa," how fast was the wagon going then?
A. It was going just as slow as it could. He give the horses warning to go down the grade.
Q. Did he say "whoa" any more?
A. After he fell off?
Q. I mean after the first time he said "whoa" did he say "whoa" any more before he fell?
A. No; not as I know of.
Q. Did he say "whoa" after he fell?
A. Yes.
Q. When he was lying on the tugs?
A. Yes.

The MASTER:

Q. How did he have the driving lines?
A. Just as good in the hand as any driver ever could.
Q. Tight or loose?

A. He had them tight.

53 Q. What was the first thing that attracted your attention to the wagon?

A. I seen Willie Furrer come along there; I hadn't seen him for a good long time, and Mr. Furrer himself; I hadn't seen him for a couple of months. If it had been any of the neighbors my attention wouldn't have been onto him so much.

Q. As the wagon struck the crossing what was the first thing that attracted your attention? Was there anything unusual about it that excited your attention—in the movement of the wagon?

A. No, sir.

Mr. BRUMBACK:

Q. Did you see the wagon come up on the east side of the track?

A. Yes.

Q. You saw it come along and come up and go over and go down?

A. Yes.

Q. Nothing attracted your attention, unusual, as the wagon came up onto the grade?

A. No, sir.

Mr. DOYLE:

Q. The wagon never got hurt any?

A. It was good and sound.

Q. The wheels were not broken, or anything of that kind?

A. No, sir.

The intervening petitioner, further to maintain the issues on his part, called as a witness JOHN W. CREBS, who, first being duly sworn, testified as follows:

Direct examination by Mr. BRUMBACK:

Q. Where do you live?

A. I live on the avenue road.

Q. How near to the avenue crossing of the Toledo, Columbus and Southern R'y?

A. About 25 rods from the house—right across.

54 Q. You own the adjoining farm to the crossing?

A. I own the land on the north side, that the railroad goes through.

Q. Do you know about the time during the summer that the ballast was put on there—the stone ballast?

A. I don't recollect the date, but it was done last summer. It was during the summer.

Q. When the ballast was put on was the railroad track raised along through there?

A. It was raised, as I understood it, from six to fourteen inches. I believe, through my place it was raised about a foot.

Q. That is, all along?

A. Yes; it is raised all through me and then on the south side.

Q. How much was it raised at the crossing there—at the track?

A. Well, I should think about a foot; maybe a little less.

Q. Do you know about the time in October that Willie Furrer was killed near the railroad track?

A. I couldn't give the date. I was there when he was lying there after he was killed. He was dead when I got there.

Q. Where was he lying when you got there?

A. He was lying, perhaps, six feet from the bridge across the creek.

Q. The bridge west of the track there?

A. Yes.

Q. How far is that bridge from the track?

A. About sixty feet; it may be more than that—I guess about six rods; that would be a hundred feet. He was lying on the side of the bank. The creek curves and the bridge crossed at the curve, and he was lying on the bank at the side of the road.

Q. Did you examine the crossing?

A. Well, I have been across there pretty often and noticed it.

Q. What would you say as to that being a good crossing or not?

A. I can say to you the same as I said to every one else,
55 that it ought to have been a longer slope on both sides.

Q. How steep was it down from the track?

A. It declines on the creek side, going down more than on the other side.

Q. It is steepest on the west side?

A. Yes; and I should think it turned down—a fall. In twenty feet from the railroad the fall would be down about twenty inches.

Q. You never measured it?

A. Oh, no; I never measured it.

Q. When the track was raised by putting in ballast I will ask you whether there was any additional dirt filled in.

A. They put on some stone on each side, and a few days after that the section hands threw on some dirt onto that. I should think it was a slope of eight or ten feet, but still it inclines on the west side still more, because the road sunk. I stood looking at it yesterday. It ain't been altered since. They have not done anything to it since.

Q. They have been teaming over it since?

A. Yes; but the company haven't done anything.

Q. Isn't it a fact that there could have been a considerable quantity of dirt carried up there by the wheels going over the track—by wagons?

A. No; I don't think so. There is snow there.

Q. I mean during the fall, when the roads were muddy.

A. No; it was very dry.

Q. Wasn't there any mud during the fall?

A. Only one week or so.

Q. When you say there were some stone put in along the track how far did they extend out beyond the ties?

A. I suppose about four feet.

Q. The stone?

A. Yes. I don't think more than that, and then they put dirt on the end from the stone. I think there was some on the dirt.

56 Q. There was no dirt on the stone, though?

A. No.

Q. Then, in coming down off from the crossing you would start from the plank onto the stone, and then that stone was on the slant?

A. Yes.

Q. And then you would pass over the stone onto the dirt?

A. Yes.

Cross-examination by Mr. DOYLE:

Q. The crossing is in about the same condition now as it was then?

A. Yes; just about the same. The company has not done anything.

Q. No change has been made in it?

A. No.

Q. And you looked at it yesterday?

A. Yes, sir; I cross it every day, most.

Q. Aside from the slope being too great or the grade being too steep, how was the crossing, as to the road itself being kept in fair order—what kind of a road? What was the condition of the road itself, aside from its being steep?

A. It was so near the creek there, the road was solid all last season.

Q. There is a little curve there?

A. There is a curve in the creek.

Q. Does the bridge go straight across?

A. It is not quite square with the creek.

Q. Does the road run right straight across without making a turn?

A. It is pretty near straight.

Q. The curve is in the creek?

A. Yes.

Q. The creek does not run directly across the road?

A. No; it runs across the road a little on an angle, and then it curves and goes along the road some two rods—follows the road.

Q. Where the railroad was raised and ballasted I understand you to say that some of this ballast stone was thrown

57 on either side?

A. Yes, sir.

Q. And then earth thrown over that?

A. They threw on, perhaps, four or five wheelbarrow loads.

Q. That would make a much better crossing, if it happened to be wet, than the bare earth, wouldn't it?

A. I don't know as it would make much difference.

Q. It would be solider?

A. Yes; but there was very little dirt right next to the track.

Q. The grade, you think, on the west side, was about 18 or 20 inches in 20 feet?

A. Yes, sir.

Q. Do you recollect how wide the railroad right of way was there?

A. They have got sixty feet.

Q. And the track and the ties occupy about eight feet in the center of the sixty feet?

A. Yes, sir.

Q. Then there would be about twenty feet on each side of the ties to the line of the railroad?

A. Yes; a little over twenty feet.

Q. How does this slope run with reference to the right of way of the railroad?

A. What do you mean?

Q. I mean, near the outside line of the right of way does the slope cease or does it run pretty close to the right of way?

A. The slope don't run over twelve feet, I don't think.

Mr. BRUMBACK:

Q. On each side of the track?

A. Yes.

Mr. DOYLE:

Q. I want to get at how high the railroad track itself is above the wagon road before it was raised—before it was ballasted—in other words. How high is the railroad track itself above the old wagon road?

A. I should think nearly twenty inches. I wouldn't be positive it is only guess-work.

Q. So that this slope that is made there is made by the
58 raise on the original surface of about 20 inches?

A. Yes, that is about the way it is. I would like to say, though, that the company had their engineers there and they will have the levels and tell all about it.

Q. You were asked what kind of a crossing that was and you said you thought it ought to be a longer slope?

A. Yes, sir.

Q. Is that the only objection you have to it?

A. Yes, sir.

Q. Otherwise the crossing is an average crossing?

(Intervening petitioner, by his counsel, objected to the question.)

A. It is an average crossing. I don't know but it is as it is, for all railroad crossings are bad enough. I don't know but it is as good as the average now.

(Question and answer excepted to.)

Q. Your only objection is to the slope?

A. Yes.

Mr. BRUMBACK:

Q. They are all bad on that road, are they not?

A. I don't know whether they are worse on that road than any other.

Mr. DOYLE:

Q. How long had that crossing been in that condition—the condition that it now is and then was?

A. If I could tell you when they done it I could tell you.

Q. I mean in a general way. How many months had it been when this accident happened?

A. It may have been two months.

Q. The ballasting was done in the summer?

A. Yes.

Q. And the road had been there several years?

A. Yes.

Q. And the only change made at the time of the ballasting was that it was raised up this additional distance to put the stones along the ties, and then those stones were thrown in to make the slope?

A. Yes.

Re-examination:

Q. This dirt would naturally fall down between the stone and leave it rough on top, wouldn't it?

A. There was some sand—I don't know.

59 The intervening petitioner, further to maintain the issues on his behalf, called as a witness one ED. BURNS, who, first being duly sworn, testified as follows:

Direct examination by Mr. BRUMBACK:

Q. Where do you live?

A. At Lime City, Perrysburg township, Wood county.

Q. Did you pass along the avenue road across the T., C. & S. railroad on or about the 15th day of October last?

A. Yes.

Q. Did you see Joseph Furrer and his son, William Furrer, that day?

A. Yes, sir.

Q. About what time of the day was it?

A. I didn't have no time with me, but it was between three and four—just before the train went down.

Q. What was the first you noticed of these men?

A. I heard some one holler "whoa," and I looked around.

Q. Where were you?

A. Just a little distance ahead of the team.

Q. Were you driving?

A. Yes.

Q. What was you driving?

A. I was driving a load of wood—wagon length.

Q. A two-horse load?

A. Yes.

Q. How long wood was this you had on your wagon?

A. The whole length of the wagon.

Q. Piled lengthwise?

A. Yes.

Q. You heard somebody call "whoa," and turned around?
A. Yes.
Q. What did you see when you turned around?
A. I see the horses on a gallop.
Q. Coming towards you?
A. Yes.
60 Q. Here is the bridge (showing witness one of the photographs, exhibits herewith) and the road, and there is the railroad. You were up above the bridge with your team?
A. Yes.
Q. And you looked back and saw the team coming towards you?
A. Yes.
Q. Did you go back then?
A. Yes.
Q. Did you see any wood falling off of the wagon or the boy fall off?
A. Why, I see, after the boy fell, I see the wood, the hind tier, I think, scattered; the hind tier was all off when I see the wagon.
Q. How was the front tier?
A. I couldn't say either way. I never took notice.
Q. You are not sure, then, what wood was off of the wagon?
A. No, sir.
Q. How long before this had you passed over the crossing?
A. I don't know; a short time.
Q. A few moments, wasn't it?
A. Yes; a few minutes.
Q. With your wagon-load of wood?
A. Yes.
Q. Tell the master what you noticed about the condition of the crossing in going over with your load of wood; how it affected your load.
A. I noticed it was a very poor crossing.

Mr. SCOTT: I object to that. He can tell what kind of a crossing it was.
The MASTER: He cannot express an opinion, but he can tell how it was.

Mr. BRUMBACK:

Q. Go on and tell.
A. It shook up my rack pretty well.

The MASTER:

Q. Why?
A. Why, there was stone there going down that hill; that shook it up pretty good.

61 Mr. BRUMBACK:

Q. Which hill do you mean?
A. Going down that hill on that side.
Q. Going down off of the track?

A. Yes.
Q. Down onto the road?
A. Yes.
Q. Did you notice some stones in the wagon road?
A. Yes.
Q. Did your wagon run over them?
A. Yes.
Q. It shook your load up pretty well, did it?
A. Yes; it did.
Q. Did you have any fears for your load or not?
A. Yes; I did.
Q. What fears?
A. For fear the rack was going to spread out.
Q. You were afraid the rack would spread?
A. Yes.
Q. Did you have a good wagon?
A. Yes.
Q. Did you see the boy there after you got back?
A. Yes.
Q. How was he—living or dead—when you got there?
A. He was dead.
Q. Did you notice what part of his body was injured?
A. Well, no; not then; he was lying so I couldn't see.
Q. Was there any blood there?
A. Yes.
Q. How much?
A. Well, I couldn't say how much.

Cross-examination by Mr. SCOTT:

Q. Do you live in that neighborhood?
A. Yes.
Q. How long have you lived there?
A. Well, it will be 20 years; 21 years the 8th day of July.
Q. All your life?
A. Yes.
Q. Did you ever drive over this road before?
A. Yes, sir.
Q. How often?
A. I couldn't say.
Q. How near did you live to this crossing?
A. About a mile and three-quarters, around the road; hardly that, either.
62 Q. Then you have been over the road very frequently?
A. Yes.
Q. Was this the first load of wood you ever hauled over there?
A. Yes, sir; it was.
Q. It was the first time you had ever hauled a load of wood over that crossing?
A. Yes.
Q. Did you haul wood from the same place that Mr. Furrer did?
A. No, sir; from Thurlow's place.

Q. Were you driving ahead of him or behind him?
A. Ahead of him.
Q. How far ahead of him were you?
A. I couldn't say how far—a short distance.
Q. What is the condition of the road at this particular place? Is it a level road—I mean the road generally—or is there a hill here on the public road—the wagon road?
A. Well, it is a level road.
Q. Where the railroad crosses the level road how high is the railroad above the wagon road?
A. Well, I don't know.
Q. About how high?
A. I don't know as I could say at all.
Q. Twenty feet?
A. No.
Q. Then you can tell something about it, can't you—two feet?
A. I never measured it. I couldn't say just how high it is.
Q. It isn't twenty feet?
A. No.
Q. Ten feet?
A. No.
Q. Six feet?
A. No.
Q. Five feet?
A. No.
Q. Two feet?
A. I couldn't say whether it was two feet or three feet or one. I never measured it.
Q. You were looking at this picture, I believe, were you not, just now?
A. Yes.
Q. Which way were you driving on that photograph?
A. I was going that way (pointing).
63 Q. Going towards that bridge?
A. Yes.
Q. You had crossed this bridge, had you?
A. Yes.
Q. I will ask you what condition that bridge is in?

(Objected to on the part of intervening petitioner. Objection overruled and the intervening petitioner, by counsel, duly excepted.)

Q. What is the condition of that bridge with reference to the road?
A. I didn't notice the bridge much.
Q. Didn't notice it much?
A. No, sir. When I went across it it didn't shake me up much.
Q. How high is that bridge above the road?
A. I couldn't say.
Q. Isn't there quite a step-off there—from this road up onto this end of the bridge isn't the dirt away from this bridge five or six inches?

A. No, sir; not as I noticed.
Q. Were you acquainted with Mr. Furrer?
A. Yes.
Q. How long had you known him?
A. I don't know how long it was.
Q. All your life?
A. Well, yes.
Q. How near did you live to him?
A. About four miles, I think.
Q. How long did you say you had known him—all your life?
A. Well, since I have been big enough.
Q. You have been boys together?
A. Well, no we ain't; neighbored together. I only just knew him, that's all.
Q. Where was this wagon when you heard the boy holler "whoa?"
A. It was between the railroad and the creek bridge. I couldn't say just how far it was.
Q. Couldn't say how far it was?
A. No, sir. I heard him holler "whoa," and then I looked around. I had to look after my team and keep them out of the road.
64 Q. You couldn't see just where the team was?
A. Yes; I could see.
Q. It was between this creek bridge and the railroad some place?
A. Yes; when I seen the team on the gallop they were.
Q. You saw the wood fall off then?
A. No, sir.
Q. Was the boy on the wagon when you looked around?
A. No, sir.
Q. He wasn't?
A. No, sir.
Q. Had you seen the Furrer boy before this accident occurred—had you seen him on the road behind you before that?
A. No, sir.
Q. Hadn't spoken to him at all?
A. No, sir.
Q. The first you knew of it was when you saw it there?
A. Yes.
Q. You went back to where the boy was?
A. Yes, sir.
Q. What did you do with your team?
A. Tied my team to the fence.
Q. Where did you take your load of wood to?
A. Home.
Q. How far was that?
A. About—well, from the woods it was——
Q. From this crossing, I mean?
A. About a mile and a half or a little over.
Q. You drove on home with your wood after the accident?
A. Yes, sir.

Q. Did you ever see any other person driving a wood wagon along that road?

A. Yes.

Q. How many?

A. I have never counted them and never took notice how many.

Q. About how many?

A. I couldn't say that neither.

Q. Every day did you see wood wagons drive along there?

65 A. No, sir; I am not around there every day.

Q. When you were there did you see wood wagons driving along this road?

A. Yes.

Q. Did they go across this same crossing?

A. Yes.

Re-examination:

Q. When you say you saw wood wagons what kind of wagons do you mean—common farm wagons?

A. I didn't know what *he* meant.

Q. You have seen wagons going along there every day with wood?

A. No.

Mr. SCOTT:

Q. Didn't you ever see wagons going along there with loads of wood?

A. Yes.

Q. How many?

A. I don't know.

Q. How often have you been there?

A. I don't know that.

Q. Wasn't it a common thing for wagons loaded with wood to go along that road?

A. No, sir.

Q. They didn't often haul wood along that road?

A. They didn't unless the Mandel road was so bad they couldn't go down there.

Q. Isn't it a better road than common roads?

A. No, sir; but they came straight down the avenue and got onto the Oregon road. If the Mandel road is bad they can't get along there.

Q. You never saw any wood wagons going along this road before?

A. Yes.

Q. How many?

A. I don't know.

Q. More than one?

A. Yes.

Q. How many?

A. I couldn't say.

Q. Was there a hundred? Do you think you have seen a hundred?

Mr. BRUMBACK: I ask to have the questions limited as to time.

66 The MASTER: We will first get the number and then the time.

Mr. SCOTT:

Q. How many wagons loaded with wood have you seen going over this road?

A. I couldn't say how many there was.

Q. About how many? You can give some idea, can't you? There was more than one, you say. Did you ever see a hundred wagons loaded with wood going along this road?

A. No, sir; I never did.

Mr. BRUMBACK: You are speaking about during your whole life, as near as you can remember?

A. Yes.

Intervening petitioner, further to maintain the issue on his part, called as a witness HENRY E. MANDELL, who, first being duly sworn, testified as follows:

Direct examination by Mr. BRUMBACK:

Q. Where do you live?

A. Perrysburg township, Wood county.

Q. How near this avenue crossing?

A. About three-quarters of a mile—about that.

Q. You live on the Mandell road?

A. Yes.

Q. How long have you lived there?

A. I have lived on the Mandell road about 18 years. I have lived in that neighborhood ever since I was nine years old.

Q. When was the Toledo, Columbus and Southern railroad constructed through there?

A. I couldn't say the exact years; about four or five years ago.

Q. It runs through your farm?

A. No, sir.

Q. Just back of your place?

A. Yes.

Q. I will ask you whether you have been teaming any

67 along the avenue road over and across the crossing of the Toledo, Columbus and Southern railroad during the last summer and fall.

A. Yes, sir; I have hauled some lumber.

Q. How often did you cross there during the fall?

A. I teamed five or six days during September; two trips a day.

Q. What part of September?

A. The latter part of September.

Q. Hauling lumber?

A. Building timber.

Q. Tell the master what was the condition of the railroad crossing on that road when you were going over there; what you noticed about its condition at that time.

(Objected to on the part of the receiver.)

Mr. BRUMBACK: We expect to show about the condition of this road.

The MASTER: It has been already testified to that there has been no change in this crossing since the accident or some time before.

(The objection was overruled and the receiver, by his counsel, then and there excepted.)

Mr. BRUMBACK:

Q. Tell us what you noticed about the crossing at that time.

A. I noticed that the descent from the crossing each way is very abrupt. I don't think it is over seven feet from the edge of the crossing to the bottom of the grade.

Mr. SCOTT:

Q. What is the descent in that seven feet?

A. I should think it was all of a foot or more.

Mr. BRUMBACK:

Q. What was you hauling across there?

A. I hauled some joist 18 feet long and some studding 2 x 4 and some sills 30 feet long, 8 x 8.

68 Q. How did you have your sills?

A. One end loaded on the top of the bolster of the forward wheels and under the axle of the hind wheels—suspended against the axle with chains.

Q. This stick was 30 feet long?

A. Yes; 8 x 8.

Q. Have you measured the height of your hind axle from the bottom of the wheel?

A. Yes; it is two feet two inches.

Q. And this stick of eight inches suspended under the axle, did it come up against the axle?

A. Not quite; there was a bolt comes through with a burr on it which would take off three-quarters of an inch; it was up against the bolt, so that the bolt would score and mark the timber as it swung.

Q. Tell how you hauled this timber and what experience you had in crossing this railroad track with the timber?

A. After my hind wheels got across there was about 18 inches or two feet of the extreme end of the timber that dragged on the crossing.

Q. That is, the whole timber was gone across except the back end?

A. Yes; the wheels of the wagon were all across.

Q. How far did the stick of timber project behind the back axle?

A. About seven feet.

Q. Then the grade was so abrupt that the stick hanging under the axle struck on its bottom side on the top of the track so as to drag?

A. Yes, sir.

Q. When your wheels had got——

A. Past the track, off of the plank and rails altogether.

Q. If the axle is two feet two inches high and the stick eight inches and half an inch for the bolt, taking that, would leave about a foot and nine inches, wouldn't it?

A. Thereabouts.

Q. A foot and nine inches high above the grade?

A. Yes.

Q. Then in the distance of seven feet there would be a
69 descent of a foot and nine inches according to that figuring?

A. I couldn't say about that.

Q. Did you notice any stones lying there?

A. There was some stones in the edge of the planking outside of the rail; yes, sir.

Q. There is a picture of the crossing; here is the railroad track; show us where those stones were located.

A. Right along there (pointing on photograph).

Q. How many stones did you notice lying there when you went over?

A. I never paid any particular attention to it. I think that (picture) represents it.

Q. This photograph was taken some time afterwards. How large were these stones that you noticed lying there?

A. As large as my fist and a little larger.

Q. Did your wagon strike these stones in passing over the track?

A. It would at times.

Q. What effect would it have?

A. It gave us a jolt and shook us up a little.

Q. Have you done much teaming during your life?

A. I have done considerable at times. I have not done a great deal during the last three or four years.

Q. If a man was passing over that railroad track with the crossing in the condition you observed, with the abrupt descent and the stones lying in the wagon track, if he was passing over that with a cord of four-foot wood loaded on the rack, and was seated upon the wood, what would be the effect of passing down on the further side of the crossing, in your judgment?

A. He would have to go pretty slowly, or he might get tumbled off—shot forward.

Q. The wood would be likely to pitch, wouldn't it?

A. Yes.

70 Q. What would be the cause of its pitching in that manner?

A. The jolt forward.

Q. It would also be the abruptness of the descent, wouldn't it?

A. Yes.

Q. When you passed over with a load and came up on the east side and went down on the west side how fast would your team go in passing down the descent?

A. As soon as the hind wheels would leave the plank on the crossing they would start on a trot without any urging and trot to the bridge.

Q. Would that be the motion of the wagon or the pull of the horses?

A. Both.

Q. But they usually go down that rapidly?

A. Yes; unless you swing.

Q. What would you say as to this crossing being a safe crossing for a high load on a wagon?

A. I should not think it would be very safe.

Cross-examination by Mr. SCOTT:

Q. You say you have lived in this vicinity ever since you were nine years old?

A. Yes.

Q. Are you familiar with this road?

A. Yes, sir.

Q. Do you live on this road?

A. No, sir.

Q. How far from it do you live?

A. A mile north.

Q. You spoke of teaming over it in September last?

A. Yes, sir.

Q. About what time in September?

A. The latter part of September. It was the after part—after the middle of the month.

Q. Before the 20th?

A. Yes; I think likely about that time—about the 20th.

Q. You hauled lumber, you said, there?

A. Yes; hauled building timber.

71 Q. And you said that the rear of that building timber—some of it—projected at the end beyond the rear of your wagon?

A. Yes, sir.

Q. How high would the rear part of the timber be from the ground?

A. The extreme end, about eight or ten inches.

Q. From the ground?

A. Yes.

Q. When you say that the extreme end struck the railroad track you mean that it only had to be let down 8 or 10 inches to do that?

A. Yes.

Q. So that there was only 8 or 10 inches of a drop to the railroad—to strike the railroad track?

A. The wheel was not clear down to the bottom of the grade then.

Q. There were seven feet back of the wheels?

A. Yes.
Q. It struck it then?
A. Yes; about 18 inches or two feet came in contact with the crossing.
Q. You mean to say that that track is 18 inches above the road seven feet from the railroad track?
A. No, sir; I said it was about a foot.
Q. Then you say that the railroad track is about a foot above the level of the road seven feet from the railroad track?
A. Yes, sir.
Q. You mean that it has a fall of one foot to seven?
A. About that.
Q. And that, you say, is a very abrupt descent?
A. Yes.
Q. One foot to seven?
A. Yes; it is abrupter than another crossing I had to cross.
Q. You have seen crossings not as abrupt as this?
A. Yes; I crossed them the same day.
Q. That were not as abrupt as this?
A. Yes.
Q. How much of a fall was there in that other crossing?
72 A. So little that I had no difficulty whatever in getting over the crossing.
Q. You did have trouble in getting over this?
A. Yes; the timber came in contact with the crossing. I sung out to the horses to get down and pull it over.
Q. You are certain that this stone ballasting was in there when you hauled this timber, are you?
A. Yes, sir.
Q. Just as it is now?
A. Pretty much the same.
Q. Has there been any ballasting done since?
A. No; but there has been a little more dirt carried in and it is a little solider now; it has been carried in on the wheels of the wagons when there was mud on the road.
Q. The railroad company has not done anything to this crossing since you hauled the timber?
A. Not that I know of.
Q. And the stone ballasting was in about the 20th of September?
A. Yes.
Q. Certainly not later than the 25th of September, was it?
A. I don't think it was.
Q. Have you ever had any experience with hauling wood in this road?
A. No, sir.
Q. Never hauled a load?
A. No, sir.
Q. You have hauled wood in your life?
A. Yes.
Q. Had a good deal of experience in time with wood?
A. Yes; some.

Q. Is it a safe place to ride, on the top of a load of wood, is that a safe place for the driver to ride in driving along the road?

A. That is where I generally ride.

Q. Where does he sit?

A. I often sit right at the front end of the load, with my feet hanging down.

Q. Where should the driver sit, as an experienced teamster?

A. That I couldn't say.

73 Q. You think that it is a proper place, then, for the driver to sit on top of a load of wood as he drove along the road?

A. Yes.

Q. When he comes to a place like this, where there is an abrupt descent—a railroad crossing—what would be a proper and safe thing to do; would it be to stay right there?

A. It would; and have full control of his team.

Q. It would be a safe place to sit?

A. If he had control of his team.

Q. Would he have control of his team if he was up there?

A. He certainly ought to.

Q. I mean, when you come to a crossing like this, where there is an abrupt descent, what would be proper for the driver to do?

A. I should stay right there.

Q. Then there isn't anything in this crossing to cause a cautious man to get off of his load and walk?

A. I don't think I should have got off.

Q. There wasn't anything in the crossing to indicate danger, was there?

A. That would depend upon the team; how they went over.

Q. Was there anything in this crossing that would cause a cautious man to take any extra pecautions?

A. Well, yes.

Q. What would a cautious man do?

A. He would hold in his team and let them go down slow.

Q. That was all that was necessary in this place?

A. That is all I would have done.

Q. That was all that was necessary? Was there anything in the locality to indicate special danger?

A. Well; it was abrupt and dropped off down, and stone in the way.

Q. How long before this accident had you seen this road?

A. It was while I was teaming.

74 Q. You didn't see it, then, from along the 20th of September until this accident?

A. No, sir.

Q. This accident occurred when?

A. I suppose about the 15th of October.

Q. From that time on you had never seen it at all?

A. No, sir.

Re-examination:

Q. You have examined the crossing since the accident?

A. Nothing, only as I passed over it.
Q. In going over it you have noticed it?
A. Yes.
Q. At the time of the accident how did it compare with its condition at the time when you were teaming over it?
A. I didn't see much change; I didn't notice much change.
Q. At the time of the accident you think it was about the same as it was at the time that you did your teaming?
A. Yes, sir.
Q. Have you noticed it lately?
A. I was teaming over it since the snow—hauling saw-logs on a sled.
Q. You say you think there has been some dirt carried in there on the wheels of wagons?
A. Yes; the wheels would be loaded pretty well with dirt, and in coming up they would jolt and jar and drop it off more or less.
Q. You say in your cross-examination it was about a foot—the grade of the railroad track—above the wagon road?
A. Yes.
Q. That is, figuring back from the place at the point that your wagon was when the timber struck the track is what you mean; for instance, the wagon would, say, be at this point partly down, and then it would strike the track?
A. Yes, about five feet; the wheel would be about five feet away from the plank on the outside of the track.
75 Q. To strike about a foot?
A. Yes.
Q. You have said that the height of the axle was two feet and two inches?
A. Yes; two feet and an inch, deducting the bolt.
Q. If the timber was eight inches thick and swung below that would leave one foot and five inches from the bottom of the wheel to the bottom of the timber?
A. Yes.
Q. If the bottom of the timber struck on the track when the wheels were going down the grade, there would have to be a difference of at least one foot and five inches to cause it to strike?
A. No; because the extreme end of the timber was only about eight inches above the ground.
Q. It sagged?
A. No; it projected beyond and, of course, was on a slope.
Q. Would the end sag down? Wouldn't the end come up?
A. No.
Q. How was that?
A. It was loaded up in front on the bolster here and under the axle behind. Of course, eight inches wouldn't sag in thirty feet; it was straight and sloped from the front end to the hind end.
Q. It would be a little lower behind than in front?
A. Yes.
Q. Then it wouldn't be quite a foot and five inches in that distance?

A. No.

Q. Where was this other crossing that you crossed that day that you had no trouble in getting over?

A. On the Toledo & Ohio Central.

Q. On this same road?

A. Yes.

Q. How far from there?

A. About two miles.

Q. Your stick didn't strike going over that, did it?

A. No, sir; I had no trouble there whatever.

Recross-examination:

Q. Are the front axle or front bolster and the hind bolster of the same height?

A. Yes, sir.

76 Q. Exactly the same height?

A. Yes, sir.

Q. How far apart are they?

A. They were in that case about 21 feet apart.

Q. How thick is the hind axle—how much space does it occupy—the axle and the bolster?

A. I never measured it.

Q. About how much?

A. About nine inches.

Q. How thick was the timber?

A. Eight inches.

Q. Now, then, in sloping back the timber from the front bolster to the back bolster it had to drop enough to go under the hind bolster?

A. It went under the hind axle.

Q. And under the axle was about nine inches and the timber eight inches?

A. Yes.

Q. So that in going back the length of the wagon that timber dropped 8 and 9 inches, which was 17 inches?

A. Yes, sir.

Q. And then it kept on sloping to the end of the timber?

A. Yes, sir.

Q. Just in the same proportion?

A. Yes.

Q. And you say the end of the timber would strike the railroad track after you had crossed over it?

A. Yes; about five feet—about five feet from the crossing—the wheels.

Mr. BRUMBACK:

Q. Is the axle of your front wheels lower or higher than the hind axle?

A. The axle is lower, but the tops of the bolsters are of the same height from the ground—two feet and eleven inches.

Q. How high is that Ohio Central crosssing above the grade?

A. I think it is a little higher than the T., C. & S.

Mr. SCOTT:

Q. How far apart are they?
A. About two miles—the two railroads.

Mr. BRUMBACK:

Q. How high is the railroad above the wagon road?
77 A. There is not much difference. It has a longer grade each way from the track. The Ohio Central, it has an easier grade.

The intervening petitioner, further to maintain the issues on his part, called as a witness SYLVESTER F. CURTIS, who, first being duly sworn, testified as follows:

Direct examination by Mr. BRUMBACK:

Q. Where do you live?
A. In Perrysburg.
Q. What official position do you hold?
A. I am justice of the peace and postmaster.
Q. Were you called in to act in any capacity at a death that occurred about the 15th day of October, near the avenue crossing of the Toledo, Columbus and Southern railroad?
A. Yes, sir.
Q. For what purpose was you called in there?
A. Well, to examine the body of Mr. Furrer.
Q. To hold an inquest?
A. Yes.
Q. What did you do?
A. I took the names of some of the witnesses which were there—men that saw it and saw the condition that the road was in.
Q. What time did you get there?
A. I think it was between four and five o'clock in the afternoon on Sunday.
Q. The accident was on Saturday?
A. Yes, sir.
Q. That was the next day, then?
A. Yes.
Q. You got there on the afternoon of the next day after the accident?
A. Yes.
Q. Where was the boy?
A. Over at his father's house.
Q. Did you call in some parties to help you examine the case?
A. Yes, sir.
78 Q. What was your object in making that examination?
A. To find out how the boy was killed.

Mr. SCOTT:

Q. Were you acting as coroner there?

A. Yes, sir.
Q. Are you a coroner?
A. No, sir; I am a justice of the peace, but there was no coroner within ten miles of the place.

Mr. BRUMBACK:

Q. How many did you call in to act with you in the matter?
A. I think there were four or five that were subpœnaed.
Q. You issued subpœnas and qualified them, did you?
A. Yes, sir.
Q. Did you proceed then to examine the body and the place where the accident occurred?
A. I did.
Q. Did you examine these witnesses?
A. Not there; I examined witnesses the day after; you see, that was Sunday.
Q. Where did you examine the witnesses?
A. At Perrysburg.
Q. You called in the witnesses the next day at Perrysburg?
A. Yes.
Q. Issued subpœnas for them?
A. Yes, sir.
Q. Did you go to see the boy on Sunday afternoon?
A. Yes.
Q. Tell us what was the condition of the boy's body when you examined it?
A. Well, he was all scratched up—the face and hands and across the head it looked to me as if the wagon had run over it.
Q. The head smashed in?
A. Yes.
Q. Did you and the parties with you proceed to the place of the accident?
A. Yes.
Q. What did you do there?
A. Well, we looked at the crossing and examined things all around.
Q. How did you find the crossing that day? Describe it as
79 near as you can.
A. I should call it a pretty bad crossing.
Q. Yes; well, now, give us your reasons for so saying.
A. The crossing—the grade to the crossing—is too short for one thing, and then there was a lot of stone lying there which, it seems to me, hadn't ought to have been there.
Q. In the wagon track?
A. Yes, sir.
Q. How many stones were in the wagon track?
A. I don't know. I threw out some five or six.
Q. How many did you observe in the track?
A. I threw away out of the road some four or five or six, I don't know which, and one larger-sized one I shoved out of the way with my foot. I think it was on the side next to the river—on the north side.

Q. How large were these stones which you picked up out of the wagon track?

A. I don't know. I couldn't tell exactly. This one stone that I shoved out of the way with my foot it was ten—eight or ten inches long, four inches wide, and about four or five inches each way; maybe ten or eleven inches long.

Q. What kind of stone was that?

A. It was a limestone.

Q. You picked it up out of the way?

A. I shoved it out of the way with my foot, so it would be out of the way, provided anybody else came along there with a team.

Q. Where were these stones lying? Show us right there on that photograph.

A. That big stone that I had reference to lay right off in that track (wagon); there was that big stone that I shoved off with my foot, and then there was a few I threw right there on this side of the track.

Q. What made you pick these stones up?

A. To get them off of the track, so they wouldn't hurt anybody else. They were so large I thought they hadn't ought to be in the track anyway.

Q. You say this fall—the approaches to this railroad are
80 too short?

A. Altogether too short.

Q. How wide do you think they were—how much did the filling extend each side of the track?

A. I don't believe over four or five feet.

Q. What was the verdict rendered the next day?

A. The law is now that there is no jury empaneled in a case of that kind. The justice takes the testimony of witnesses—takes it down in writing—and that is returned to the clerk of the court of the county with his verdict.

Q. What was the verdict?

A. Negligence of the railroad company was my verdict.

Mr. SCOTT:

Q. Criminal carelessness is what was said in your verdict.

A. Yes; that is what I said by the verdict, and according to the testimony and what I see, I couldn't make anything else out of it.

Cross-examination by Mr. SCOTT:

Q. Where do you live?

A. In Perrysburg.

Q. Do you know Mr. Furrer?

A. Yes.

Q. How long have you known him?

A. Maybe four or five or six years.

Q. Is that all?

A. I think that is all.

Q. Who came for you to act as coroner?

A. It was Chamberlin and Ward.

Q. Where did you go then?
A. I went down to the place.
Q. Didn't you go to his house?
81 A. Yes; not first, though. I went to the place where the accident happened.
Q. Who went with you?
A. Mr. Chamberlin and Mr. Ward and one or two others went with me.
Q. Was that before you saw Mr. Furrer?
A. Yes.
Q. Then you went to his house?
A. Yes, sir.
Q. Where did you take the testimony?
A. At Perrysburg the day after—on Monday. This was Sunday that I was down there to look at the crossing and at the body.
Q. You had those men who went with you to the crossing come and give their testimony?
A. No; the men subpœnaed were men that saw this accident here on the road.
Q. You took their testimony in Perrysburg and then rendered a verdict?
A. Yes, sir.

Re-examination:

(Counsel shows witness a stone.)

Q. Do you recognize that stone?
A. That stone looks very much like the stone that I kicked out of the road.
Q. Can you identify it and say that that is the stone?
A. I should say it was.
Q. How does it compare with that stone?
A. I should say it was the stone.
Q. How was the road ballasted along there?
A. It looked to me as if it was all stone.
Q. What kind of stone?
A. Some like that and some smaller, and maybe some larger.
Q. It is pretty coarse ballast, isn't it?
A. I should think so.

(Said stone offered in evidence, but too bulky for conveniently attaching to testimony, said stone being about 8 in. long and 5 in. thick each way.)

The intervening petitioner, further to maintain the issues
82 on his part, called as witness R. V. CHAMBERLIN, who, first being duly sworn, testified as follows:

Direct examination by Mr. BRUMBACK:

Q. Where do you live?
A. Ross township, Wood county.
Q. I will ask you if you were over to the avenue crossing of the

Toledo, Columbus and Southern railroad on or about the time that William Furrer was killed there?

A. The day after.

Q. What did you do when you got there?

A. Oh, we examined the railroad track and the grade.

Q. Tell us how you found that crossing when you examined it that day. Describe it as near as you can.

A. Well, there was stone each side. There was plank on the outside of the railroad iron and stone.

Q. Plank in the middle between the rails?

A. Yes; and one on each side of the track on the outside of the rails and extending, I should say, about twelve or fifteen inches from the railroad iron.

Q. The plank?

A. Yes; and then it was about from 20 inches to two feet fall in from four to five feet.

Q. Did you examine it carefully?

A. Yes, sir.

Q. What kind of stones were these that you speak of lying on each side of the track next to the plank?

A. Well, there was small stones. That (meaning stone exhibited to last witness and in evidence) was the largest one.

Q. Tell about the stones generally.

A. Oh, as large as your fist and from that on up to three or four inches, two or three inches wide.

Q. How many were there lying there?

A. Well, there was nothing but stone next to the track; it was ballasted with stone.

83 Q. Was there any dirt on these stones?

A. No, sir.

Q. You say it was a descent of twenty inches to two feet in five feet?

A. Yes; from four to five feet.

Q. Was it on Sunday that you were there?

A. Yes.

Q. Was there any unevenness in this descent that you noticed?

A. Well, about four to five feet there was a little bit of a drop—a kind of a chuck.

Q. Look at that photograph and show us where that hole is that you speak of.

A. I should say it was about—that looks like the hole there (pointing).

Q. Was there any drop from the plank right down to the ground here next to the track?

A. Not much; that was stone. The stone rose up a little.

Q. Did you pick up any of those stones?

A. Yes.

Q. Look at that stone (already referred to by last witness and hereafter called Exhibit A) and state if you recognize it.

A. That is the stone I picked up and showed to Mr. Curtis, and

there was marks where the wheels had hit it—you could see where it had been rubbed.

Mr. SCOTT:

Q. Where are they now?
A. I suppose they are gone, but there was at that time.

Mr. BRUMBACK:

Q. Do you think that is the stone?
A. That is the stone.
Q. Who picked up the stone?
A. I did.
Q. And brought it to the city?
A. Yes.

The MASTER:

Q. Where has the stone been since that time?
A. I left it at Mr. Brumback's office.

Mr. BRUMBACK:

Q. Picked that stone up on the road there, did you?
A. Yes.
84 Q. And left it in my office?
A. Yes, sir.
Q. You think that is the one?
A. Yes.
Q. Who went to Perrysburg after the justice to hold an inquest, if you know?
A. Myself and Mr. Ward.
Q. Were you present when Justice Curtis and the others examined the crossing?
A. Yes.
Q. How did you ascertain the height of the grade of the track above the wagon road?
A. Why, we took a piece of board and held it on the level on one side of the track and took our hands and held it up on that board, and I sighted across the top rail—across the track.
Q. And then marked it on the stick?
A. Yes.

Cross-examination by Mr. SCOTT:

Q. When did you first hear of this accident?
A. Saturday.
Q. About what time?
A. Well, it must have been as far as five o'clock.
Q. Are you any relative of Mr. Furrer?
A. No, sir. My wife is a cousin of his wife.
Q. You are then related by marriage?
A. By marriage.
Q. Who was with you when you found that stone?
A. Mr. Curtis, the justice.

Q. Who brought Mr. Curtis there?
A. I went for him.
Q. Who was the first one to notice this stone?
A. I picked it up first.
Q. Didn't he go along and kick it off of the road?
A. I don't know that he kicked this one, but he picked up some stones and put them on a pile.
Q. Had you been at the crossing before Mr. Curtis went there?
A. No, sir.
Q. You and he went there together?
A. Yes; and Mr. Ward and the marshal.
85 Q. You took it away with you at that time?
A. No, sir; I went there afterwards.
Q. How long afterwards?
A. I don't know.
Q. The same day?
A. No, sir.
Q. The same week?
A. No, sir.
Q. Two weeks afterwards?
A. Yes.
Q. Within two weeks?
A. No, sir; it was longer than that.
Q. You can tell some time how long afterwards it was that you went back and got that stone?
A. Well, I should think it was a month.
Q. Wasn't it more than a month?
A. I don't think it was.
Q. A month afterwards you went there and got that stone and then brought it and gave it to this man, did you?
A. Yes.

Mr. SCOTT: Admits that the stone (Exhibit A) is the stone this man brought in and gave to Mr. Brumback.

The intervening petitioner, further to maintain the issue on his part, called as a witness WILLIAM WARD, who, first being duly sworn, testified as follows:

Direct examination by Mr. BRUMBACK:

Q. Where do you reside?
A. Perrysburg township, Wood Co.
Q. Did you visit the avenue crossing of the Toledo, Columbus and Southern railroad about the time of the accident whereby William Furrer lost his life at that point?
A. Yes, sir; that was the next day after the accident.
Q. In whose company did you go there?
A. I was in company with Mr. Chamberlin and also Mr. Curtis, of Perrysburg, and another man—the deputy marshal, I think.
Q. What did you do when you got there?

86 A. Well, I noted the condition of the crossing. I went there for that purpose. Mr. Chamberlin requested me to go there with him.

Q. Mr. Chamberlin took you there?

A. Yes, sir.

Q. Was the justice of the peace with you?

A. Yes, sir.

Q. Did you examine the condition of the crossing carefully, or not?

A. Well, I thought I did.

Q. Now tell us the condition of the crossing there the next day after the man was hurt.

A. Well, it differed very little from the ordinary or general railroad crossings, except the track was higher than usual for a level country—a level strip of land; the track was up, perhaps, 18 or 20 inches, I should say; possibly it was two feet; and I noticed that the filling didn't extend very far on either side of the track, and that the ballasting along the rail—along the ties—was of very coarse stone, not finely broken; they were left coarse; and that is about all I noted.

Q. How steep was the descent from the track down to the grade of the road?

A. From the track—that is, on the fill or down to the general level of the road?

Q. On the fill, at the sides.

A. Well, it was not—there was very little—it was not until you get off the fill——

Q. You don't understand what I mean. I mean, what was the descent in the approach to the track—how steep down was it?

A. It was quite sharp—quite steep. Suppose this surface to be the track, there was a little fall on the east side and then quite a sharp jog off—a little steep, the earth, on both sides, and then a sharp jog off.

Q. The dirt descended rapidly?

A. Yes.

Q. Tell us what effect that would have upon a team passing over there with a heavy load, the track being constructed in that
87 manner at the crossing; tell us how a team would act in going over there with a heavy load.

A. Well, with a heavy load they would probably be put down to their strength to get over or to make the raise. As they struck the fill—the dirt thrown in—it being so sharp and short, they would have to be put down to their metal to raise and go over the track.

Q. When they got to the top of the grade, how about going down?

A. Well, I should think they would go down very rapidly.

Q. Why?

A. In consequence of the pitch and their being under headway and gaining the summit or top and coming to the pitch immediately before they stopped.

Q. Now a team coming up on the track with a heavy load would be pulling strongly?

A. Yes.

Q. And before the man on the load could check them they would be still pulling and go down on the other side rapidly, wouldn't they?

A. Yes, somewhat. I have teamed some little.

Q. What is your business?

A. I am at present a fruit-grower.

Q. You live on a farm?

A. Yes.

Q. These stones that you speak of being there, that you noticed, did you notice any being in the wagon track?

A. Aside from the string along at the ends of the ties?

Q. No; where the wagon would go along would they strike any of these stones?

A. Yes; the stones lay along at the ends of the ties and between the ties.

Q. Was there any dirt on the stones?

A. Not much at that time.

Q. Did the stones lie directly in the wagon track or not?

A. Yes; they lay directly in the wagon track; there was a continuous string of them right across the road, across the wagon track.

88 Q. Tell what the size of those stones was lying in the road.

A. Well, I took up several of them and commented upon them and measured them with my hand in that way—I had no rule. I pronounced them four inches square. They were of the thickness of my hand (wide) and four and six inches long. They were of the thickness and the width of my hand.

Q. How did they compare with that (referring to Exhibit A)?

A. Well, that section cut through there (indicating middle) would represent very nearly the average of the stones—not quite perhaps, but nearly. (Witness referred to small end of Exhibit A.)

Q. Cutting Exhibit A through the middle, the smallest end would represent about the average?

A. Yes.

Q. Did you notice any stones there as large as that which you have in your hands (A)?

A. No, sir; I didn't notice any as large as that.

Q. But you think the average would be about the size you have stated?

A. Yes, sir.

Q. Do you know Mr. Furrer?

A. Yes.

Q. Are you acquainted with his family?

A. Yes.

Q. How many children has he?

A. Well, he has four, I think. I am not very intimately acquainted, only I have known him as a neighbor for a good many years.

Q. He has a wife, has he?

A. Yes.

Q. Is Mr. Furrer lame in any way?
A. Yes.
Q. What is the character of his lameness?
A. He is crippled in his foot.
Q. He has a wooden leg?
A. Yes.
Q. Did you know Willie Furrer?
A. Yes.
Q. Tell us what kind of a boy he was—about his size and capacity for earning money and the character of the boy in general.
89 A. Well, he was a boy of fair physical appearance and size, rather tall.
Q. About six feet tall, wasn't he?
A. Yes; I should judge. He was generally termed a good boy. He was liked by every one. He had no bad habits that I know of. I have heard him spoken of as being a boy of good morals. He was rather above mediocrity in intelligence.
Q. How about his industry?
A. I think he was industrious. He seemed to have the leading share of things at home.
Q. Do you know anything about his taking charge of his father's place there and supporting the family?
A. It was generally supposed that he was the leading character there on the farm. I had a little business there with Furrer in the spring and went to see him, and he referred me to Will. He says: "Will. has charge of the work. If he can do the work it will be all right." Will. did the work for me. I wanted some plowing done.
Q. What wages did you pay him?
A. I paid him $3.50 a day for himself and team.
Q. Take a boy of that kind and his father not able to manage the farm—not able to do any work—and the full charge of the farm being left upom him and the support of the family, what would he reasonably be worth per day as wages? What would it cost to replace him and put some other one in his place, per day—a good, competent man of this character?
A. I hardly know. I wouldn't put his services at less than $1.50 a day—somewheres along there.
Q. You would have to pay $1.50 a day for an ordinary laborer?
A. Yes; about that.
Q. What would a man be worth more than an ordinary laborer to exercise the management and intelligence in that direction on the farm and take full charge of it? You can judge by
90 what you would have to pay for a man on your place for that? It is just your opinion.
A. Well, it would be perhaps a little more—nothing less.
Q. Two dollars a day. Could you get a man of that kind for that?
A. Yes; I think so; perhaps a little less. I should hardly think I would go as high as that. He was a young man who might develop into something worth more; but for Mr. Furrer's business I

think I could get a man for five or six hundred dollars a year who would do as well as Will. would have done.

Q. Do you know anything about how much he contributed to the support of the family?

A. No; I don't know exactly. Well, I might have heard him referred to as the main stay. That is all I know.

Cross-examination by Mr. SCOTT:

Q. How much of a farm has Mr. Furrer got?

A. Thirty acres, I think.

Q. Is it all cultivated?

A. Nearly all.

Q. How much of it is not cultivated?

A. I couldn't say exactly. I think there is a small part of it that is not cultivated.

Q. Do you think that Mr. Furrer or any one else could afford to pay $600 to have a man superintend that farm?

A. It would depend upon what he farmed with.

Q. Farming it as they are farming it now?

A. No; I think not, perhaps. They are farming it in the ordinary farm crops—with corn, oats, &c.—grasses.

Q. How much corn can they raise on that farm as it now is?

A. It would depend upon the amount—the breadth they planted.

Q. How much of the thirty acres is not cultivated at all?

A. Oh, he might raise, perhaps, raise from 500 to 2,000 bushels of corn.

Q. What would it be worth there? If he raised that
91 amount how much other stuff could he raise?

A. Not very much.

Q. What would 2,500 bushels of corn be worth?

A. Well, four or five hundred dollars, I suppose.

Q. Suppose he paid $600 for the cultivation of it, how would he come out at the end?

A. Oh, he couldn't do that.

Q. Then what do you mean by saying that it would take five or six hundred dollars to hire a man to farm that place?

A. I didn't say to farm that place alone, but works other land and does other work with the team. He rents other land, Mr. Furrer does.

Q. Right adjoining this farm?

A. Yes; he has.

Q. How much has he rented there?

A. I couldn't tell you. I think he had in some fifteen or twenty acres, of wheat mostly, I think, on the other land, aside from his.

Q. How much did he farm altogether there, do you know?

A. No; I don't.

Q. Have you any knowledge on the subject at all?

A. I know he worked his own farm and worked other pieces of land.

Q. How many other pieces?

A. I don't know that he worked more than the land of one other party.

Q. How much of that was there?

A. I couldn't say.

Q. About how much? Didn't you ever see it?

A. No; I think not; I have seen some of it—a portion of it. I saw some of the grain standing there, but how much he had I don't know.

Q. About 20 acres?

A. I think less than 20.

Q. You take a boy not quite 21 years old, how much is he worth to you if you board and clothe him—how much beyond his board and clothes—how much is he worth per year?

A. Aside from his board and clothes?

Q. Yes.

A. Well, I don't know. He is worth probably a hundred dollars or such a matter.

92 Q. Could you afford to take a boy less than 21 years old and board and clothe him and pay him a hundred dollars a year on your place? (Objected to.) Well, I will say on Mr. Furrer's thirty acres and the less than 20 acres in addition.

Mr. BRUMBACK:

Q. And do the work that he did for everybody else?

A. If he was confined right to the place it would make some difference.

Mr. SCOTT:

Q. Would it take one man to farm that much land?

A. Very nearly.

Q. How much work could he do outside if he properly farmed that thirty acres and the 20 acres additional rented? Don't it take one boy 21 years old to farm that much?

A. Very nearly.

Q. Fifty acres?

A. Yes.

Q. Suppose you would take a good farm boy, 21 years old, and breed him and qualify him to run a farm and pay him one hundred dollars in cash to run such a farm as Mr. Furrer's?

A. I would have to do it, certain. You see, a boy from 19 to 21 years old is able to do a man's work. You can't hire a competent young man anywhere in the country there, I should think, for less than twelve to sixteen dollars a month and board. The clothes should be another consideration, of course.

Q. Twelve to sixteen dollars, with board and without clothes——

A. Would hire an ordinary average young man.

Q. I want to ask you what day it was that you were there at the crossing?

A. Sunday.

Q. You were there at the time Squire Curtis was there?

A. Yes, sir.

Q. And at the time Mr. Chamberlin was there?

A. Yes.

93 Q. You didn't see any stones the size of this one there, did you (referring to Exhibit A)?

A. No, sir; not in the road; there might have been others lying along the track, but none that I observed as large as that.

Re-examination:

Q. Do you know that this young man worked around the neighborhood when he had opportunity and had no work to do at home?

A. Yes; I know he worked for Mr. Frick just before he worked for me.

Q. Didn't he work all around in the neighborhood, wherever he could earn money?

A. Yes.

Q. Do you know about him buying wood and hauling it to the city and selling it here on the market?

A. No, sir; I have no knowledge of his dealing in wood.

Q. I will ask you if you know how many horses Mr. Furrer keeps?

A. I think he keeps about four working horses and some young stock.

Q. Have you knowledge of this *your* man working these teams around the neighborhood at good wages?

A. Well, I know that he worked.

Q. So that his labor was not confined to this thirty acres or the fifty acres of land, was it?

A. No, sir; not altogether.

Q. And during the winters and times when he had leisure he had other work, I understand you to say?

A. Yes.

Q. Do you know anything about his being a musician?

A. Not much. I know he was a violinist and was out evenings frequently in that capacity.

Q. Did you know that he played for parties on the violin in an orchestra?

A. Yes; I have heard of that. I don't know anything about it personally.

94 Q. What you were speaking about a boy being worth in the neighborhood of two dollars a day to a place was, considering his whole time, put in the way of manual labor?

A. Yes; we were speaking of a boy of Will. Furrer's capacity then, as I understood it.

Q. The management?

A. Yes; not every boy of his age——

Q. What could the boy earn per day with a good team, take it the year around?

A. Well, generally from three to four dollars, including the team.

The MASTER: I understood Mr. Ward to state that when he put the boy's services at $2 a day it included his care of the team and his services in connection with the team.

WITNESS: Yes; I took that into consideration.

Mr. BRUMBACK:

Q. You included that?
A. Yes.
Q. In laboring with the team?
A. Not him and the team, but the boy alone.

Intervening petitioner, further to maintain the issue on his part, called as a witness AMON JOHNSON, who, first being duly sworn, testified as follows:

Direct examination by Mr. BRUMBACK:

Q. Where do you live?
A. Up the river, about four miles, on the east side.
Q. How near do you live to Mr. Joseph Furrer?
95 A. About one hundred rods from his place.
Q. How long have you lived there?
A. For the last 22 years.
Q. How long has Mr. Furrer lived there?
A. He has lived there ever since we have.
Q. Did you know his son, William Furrer, when he was alive?
A. Yes, sir.
Q. What kind of a built man was he?
A. He was a tall and pretty rugged boy.
Q. Was he as large as a man?
A. Yes; taller than I am.
Q. About six feet tall, then?
A. Yes.
Q. Do you know about his working around his father's place?
A. Yes; he went on and done all the work; in fact, the hard work, plowing and such things as that—took the lead.
Q. Managed the place, did he?
A. Yes.
Q. Did he do any work for the neighbors?
A. Very often outside. He plowed for Mr. Ward last spring and a man named Jacobs. He used to team for quite a good deal.
Q. How many horses did his father have?
A. Four.
Q. Did he work these horses?
A. Yes.
Q. Did he do teaming?
A. When he got through his labor on the farm he teamed.
Q. Do you know about his buying wood and selling again here in the city?
A. Yes.
Q. How much of that did he do?
A. I don't know. They hauled a good deal of wood above our place, where they got their wood.
Q. What did they do with it?
A. Brought it home and then brought it to the city.

Q. Reloading it there and then brought it to the city?

A. Yes, sir.

96 Q. What is a man worth to a place to go ahead and take full charge of it, and farm forty or fifty acres and manage it and do the labor and control it, and at odd times, when he had no work at home, from time to time, to go out around the neighborhood and work for wages?

A. I should say it was worth $2 a day.

Q. Did you know anything about this young man having any musical education?

A. Yes, he was a good musician.

Q. What did he play mostly?

A. The fiddle.

Q. Did you know about him playing for parties in the orchestra?

A. Yes; often. Sometimes he was out twice a week, or maybe three times, and then again there might be a week he wouldn't be out at all.

Q. How much would he receive per night for this kind of work?

A. Oh, as a general thing, $2; sometimes more.

Q. You have attended parties where he was playing, have you?

A. I have been there.

Q. Do you know anything about how Joseph Furrer's family is left without his being there?

A. It throws it onto the next brother—younger—and deprives him of a school education.

Q. It requires him to go to work?

A. Yes.

Q. He is a younger boy?

A. Yes.

Q. How old?

A. I don't know; he is quite a chunk of a boy.

Q. He is doing the work now, is he?

A. Yes; he is doing the teaming this winter. It takes him out of school. The school is near my house.

Q. Does it require any other help to do the work?

A. His sister has to help some now; she can't go to school.

Q. Do you know how old the sister is?

A. No, sir; I don't; she is a young lady.

97 Cross-examination by Mr. SCOTT:

Q. You live right near Mr. Furrer, do you?

A. Yes; I should judge, about a hundred rods from there.

Q. Mr. Furrer has lived there since you recollect?

A. Yes, sir; very near that,

Q. Does Mr. Furrer own the farm there?

A. Yes; 30 acres.

Q. How long has he owned it?

A. I was a boy ten years old, and he owned it then.

Q. How old are you?

A. Thirty-two.

Q. Then twenty years ago he was there and had this farm?

A. Yes; as much as that.

Q. This boy that was killed was the oldest child that Mr. Furrer had?

A. Yes; he is the oldest of the family. He wasn't quite twenty-one; very near it; lacked a few days of 21. He would have been 21——

Q. Did Mr. Furrer farm any other land except the 30 acres that he owned?

A. He rented a place below that. I think there is forty acres in the place; I don't know exactly. He didn't farm it all; he just rented it.

Q. How much did he rent?

A. Probably half of the place. It might have been more.

Q. About 20 acres?

A. Yes; or thirty. It was probably 30 of it that he worked.

Q. Did you ever see Mr. Furrer do any work?

A. He helped around a little; he couldn't get around to do very much; the boy did the most of it.

Q. Could he walk, this man?

A. Yes; but he can't get around to follow the plow; he has a foot off.

Q. Can't he follow a wagon over the road?

A. I don't know. I have never seen him.

98 Q. Can't he plow?

A. Not since he has been hurt.

Q. When was he hurt?

A. I don't know.

Q. Can't you tell about when?

A. He was hurt with a threshing machine some eight or ten years ago. It was the second year I was married, I guess.

Q. You say young Furrer had a musical education?

A. He played the fiddle.

Q. Mr. Brumback asked you if he had a musical education and you said yes, but you simply mean that he played on the fiddle?

A. He played the fiddle and the accordeon.

Q. You don't know where he was educated as a musician?

A. No, sir.

Q. Never heard of his going to an academy of music or a conservatory?

A. Not that I know of. I never heard of his going away — any place.

Q. How many people were in this orchestra that he played in—musicians?

A. Two sometimes played and sometimes three of them.

Q. Who was the leader?

A. He always went ahead.

Q. The pay sometimes $2 a night and sometimes more?

A. Yes; that is what he got. I don't know what the others got.

Q. How do you know what he got?

A. Because he has been at my house.

Q. You had paid him?
A. Yes.
Q. When he played at your house you paid him $2?
A. Yes.
Q. Did you pay the others anything?
A. He was the only man at my place that night.
Q. The only man in that orchestra?
A. Yes; the only man who played at my house that night.
Q. How many of these parties have you known of his attending in one year?
A. I couldn't say.
99 & 100 Q. Parties summer and winter—all the season?
A. Pretty near.
Q. This man, then, had farmed this home farm of thirty acres; this boy had farmed this twenty acres near there, and took care of these two teams, and worked out a great deal for the neighbors with the two teams, and run a musical orchestra, besides attending dances all the year round?
A. They didn't play all summer; often through the summer, he did.
Q. About how many times during the year did he attend parties and play in them?
A. I couldn't tell you.

Re-examination:

Q. How far is Mr. Furrer's farm from the city limits?
A. Well, I should say it was a little over a mile right due north from his place to the city limits.

Mr. Scott:

Q. How far is it where this boy was killed to Perrysburg?
A. I could not tell you. I am not well enough acquainted with the road to tell you.
Q. Were you never at Perrysburg?
A. Yes; but we always go by the river road.
Q. Didn't you live near where this accident happened?
A. No, sir; I didn't live within three miles of there.
Q. Was this boy three miles from home when he was killed?
A. Yes, sir.
Q. Where was he hauling the wood to?
A. Bringing it home.
Q. You don't know how far it is from that crossing to Perrysburg?
A. No; I don't.
Q. You said he had a sister who is a young lady?
A. Yes.
Q. She has to work now. What work does she do now that he used to do?
A. She helps at the chores around the barn now.

101 The intervening petitioner, further to maintain the issue on his part, introduced in evidence copy of letters of administration, which is hereto attached, marked Exhibit 2, and made a part hereof.

The intervening petitioner, further to maintain the issues on his part, called as a witness JOHN E. PARSONS, who, first being duly sworn, testified as follows:

Direct examination by Mr. BRUMBACK:

Q. You are a resident of the city of Toledo?
A. Yes, sir.
Q. What is your business?
A. I am agent of the Mutual Life Insurance Company of New York and also of the Hanover Fire Insurance Company of New York.
Q. Have you got any mortality tables?
A. Yes.
Q. Tell us what the expectency of life is of a man 21 years of age, according to the life tables generally in use. You can give the Carlisle table and the others.
A. The Carlisle table gives 40.75—forty years and seventy-five hundredths.
Q. That is the ordinary expectancy of a man 21 years old?
A. Yes, sir. The table we use is the American Experience; that gives 41.53. Most of the American companies use that. Then we have another table here, used by some, called the Combined Experience. That puts it at 40.79.
Q. They are all about forty years?
A. Yes, sir.

The intervening petitioner, further to maintain the issues on his part, was himself, JOSEPH FURRER, sworn, and testified as follows:

Direct examination by Mr. BRUMBACK:

Q. Are you the intervening petitioner?
A. Yes, sir.
102 Q. I will ask you whether you are the administrator of the estate of William Furrer, your son?
A. Yes, sir.
Q. Are these (Exhibit "B") your letters of administration?
A. Yes, sir.
Q. You and your son, Willie, were in Perrysburg township, along the avenue road, along about the 15th day of October, 1887?
A. Yes.
Q. What did you go there for?
A. To get some cord-wood.
Q. Whose farm did you go to?
A. Jacob Suter's.
Q. It was on land owned by him, was it?
A. Yes, sir.

Q. You had bought some wood of him, had you?
A. I bought eleven cords of him.
Q. And you and your son went to haul it?
A. Yes.
Q. What kind of a wagon did you have?
A. I had a good, stout solid wagon—a good team and wagon—a two-horse wagon.
Q. What kind of rack did you have on?
A. I had a good, stout, solid rack on.
Q. How many standards on a side?
A. Four to each tier.
Q. How many tiers?
A. Three tiers.
Q. That would make six standards on a side.
A. Yes.
Q. In regard to Jacob Suter's place, that is east of the avenue crossing, isn't it?
A. East. A little southeast of the crossing.
Q. When you got there who loaded the wood?
A. My son William, and Henry Suter helped some.
Q. The boy who testified here yesterday?
A. Yes.
Q. Tell us how the wood was put on the rack now.
A. I always thought I was a pretty good judge of loading wood. I sat right by when they loaded it and I thought it was loaded properly, good and solid. It was supported by sticks in front and back.

103 Q. How many tiers of wood on the wagon?
A. Three tiers.

Q. It was four-foot wood?
A. Yes, sir.
Q. The wood was piled endwise of the rack?
A. Yes.
Q. Two stakes on each side of each tier?
A. Yes.
Q. You spoke about sticks which were at each end of the rack. How were they laid in?
A. They were laid crossways. They gave a pillow which naturally pitched the back part of the wood in and the front up, so it would naturally keep the front part from sliding out, and the back part was placed in the same way.
Q. Is that the usual way of loading it?
A. Yes; that is the usual way to haul wood.
Q. Have you done much of that?
A. I have done quite a little of it when I was at home, and have teamed since I was big enough to handle a team.
Q. When this wood was piled on the rack, tell us whether or not it was in good shape.
A. Yes; it was in good, solid condition. It was mostly split wood—some was round. It was dry wood.
Q. When you started to leave Suter's tell us who drove the team.

A. My son.
Q. Where did he sit?
A. On the front part of the tier.
Q. On the front tier?
A. Yes.
Q. Where were you?
A. I sat on the hind tier.
Q. Behind?
A. Yes.
Q. How far did you ride that way?
A. Until we got to those woods. You can see them in the photograph. It was a little soft in the woods and he rested his team, and I said, "Willie, I guess I will get off and walk." The woods are almost to the track. I walked, I should judge, a quarter of a mile—about that.
Q. Tell us, in hauling wood, where the usual place for the driver to sit is.
104 A. It is on the front tier, to see to his team in all shapes and forms; he can handle it the best. All old drivers that handle teams will tell you the same; I can bring you men to say that.
Q. When your boy was crossing how did he hold his lines?
A. I don't know. I was walking behind with my hand on the board to keep myself with the wagon.
Q. What lameness have you?
A. I have but one leg. I wear an artificial leg. All through I am diseased from the war. I am not an able-bodied man; I can't stand hard work of any kind.
Q. How long have you been sickly?
A. Ever since '63.
Q. Were you in the army then?
A. Yes. I picked up chronic diarrhea and rheumatism; I am bothered with it right straight along.
Q. When you got to the railroad crossing and was proceeding to drive over it, tell us, as near as you can, what occurred.
A. While I had hold of the boards he drove up slow and steady, and as my horses went from the track to go onto the grade he says "whoa." He went up nice and steady and slow—of course, if he had went fast I could not have staid with the wagon—and he steadied his horses by saying "whoa." As soon as he spoke that the front wheels dropped from the rail, and that gave such a sudden jump——
Q. You didn't see the front wheels?
A. I seen when they dropped. They made a sudden rush that tore my hand hold, and they rushed ahead of me ten or twelve feet; that pulled my hand loose from the wagon.
Q. This rush occurred just about the time the boy said "whoa?"
A. Yes. I picked up then to go as fast as I could. I seen there was going to be something wrong. I couldn't see my boy on the load and couldn't see him anywhere for three rods or over.
105 All at once I see him push himself out from the whiffletree

by having his feet on the tongue, as I called it, and still having hold of the lines.

Q. Where was he then?

A. About there (indicating on photograph), about half way to the bridge when I saw him first. He was holding the lines. By holding the lines he held his weight up—supported himself.

Q. What next occurred?

A. The way I looked at it, I suppose in the distance, his arms give out and in some way he dropped from the wagon.

Q. Where was that?

A. He dropped from the wagon right there where them two sticks of wood are (photograph), within about six feet from the bridge, on the right hand.

Q. Did you have these photographs taken?

A. Yes.

Q. They are photographs of the locality?

A. Yes, sir.

Q. And this is the railroad crossing?

A. Yes.

Q. And this is the bridge?

A. Yes.

Q. This one marked "C" is the one looking——

A. West.

Q. And this one marked "D" is the one looking east?

A. Yes, sir.

Q. This road is the avenue road?

A. Yes.

Q. And that is the Toledo, Columbus, and Southern railroad?

A. Yes.

Q. Right about where that stick of wood lay is where he fell off?

A. Yes; that is where the blood lay.

Q. When he fell off what occurred?

A. In one instant he was dead. The hind wheel struck him and crushed his brains. I saw it. It drew his eye outside; struck him in the forehead. When I got there I picked him up. The scalp was cut open clean to the brains and the eye was torn out of his head; he was bleeding out of his mouth and nose; it run at his nose as thick as my thumb, and out of his ears.

106 Q. How much did he bleed there?

A. I couldn't say, but he bled quite a while right there on the road; there was a pile of blood.

Q. You hurried up to the place, I presume?

A. I hurried as fast as I could; run, I can't; that is impossible for me to do.

Q. State when you got there what you did to the boy.

A. I picked him up—called for water.

Q. Picked up what part of him?

A. I picked up the head on my arm and held him up so; I thought I might bring him to. I called for water. Sometimes if you get water to any one who is faint you may bring them to. So I called for water to do my best, but there was no life there. As soon as the

blood was away he dropped back at once, and that was the end of the life.

Q. What caused his death there, do you think? Did he bleed to death?

A. The doctors claimed that the leading artery in the head was split open.

Q. When you got to him how long did he live?

A. He didn't live at all; he was dead as soon as I picked him up; there was no life there that I could see with my eyes.

Q. What was done with him next?

A. Well, there was quite a crowd come there as soon as they heard of the accident. I had witnesses of the accident and had a right to bring him home, and so I removed him to my home. I called for the coroner to take an inquest of the road and of the body.

Q. The coroner was sent for?

A. Yes, sir.

Q. Who acted as coroner?

A. Squire Curtis, of Perrysburgh.

Q. Tell whether you noticed the crossing there that day.

A. No, sir; I didn't.

Q. Why not?

A. I was a perfect stranger to the road.

107 Q. I mean after the accident, why didn't you notice it?

A. No, sir; I was interested in my son more than the crossing, at that time. I didn't even see my team after I got to my boy. I didn't see nothing but my son.

Q. Where did the team go?

A. The team run, I should judge, about 80 rods from where he dropped, and they caught them.

Q. When did you, if at any time, notice the crossing of the railroad?

A. I noticed it on Tuesday following. I had to go to Perrysburgh on the inquest, and drove that way to see the place. I looked over it that day.

Q. Tell how the crossing looked there as you noticed it at that time.

A. I thought it was rough, steep, stony, and rocky, so far as I could see.

Q. There were some stones lying on the road then, were there?

A. Yes, sir.

Q. How large?

A. Four inches square, three inch, and all sizes.

Q. What, in your judgment, was the cause of the runaway and the death of your son?

A. Why, the rack came falling into the horses——

Q. The what?

A. The wood, and of course most any team would take up and run—be frightened, scared. Of course, if you give a horse a whip he will go, so I think that the wood was it.

Q. The crossing being steep, what effect would it have on the wood?

A. It would shake it up and at the same time when it dropped from the rail it would throw it off.

Q. When the wagon went down the incline?

A. Yes.

Q. Tell what kind of a team of horses this was.

A. Well, it was a pretty good team of horses—gentle.

Q. Young or old?

108 A. One was 19 years old and the other was eleven.

Q. Did they ever run off before?

A. No, sir; I raised them myself—that is, I raised one and my brother raised the other one right in the neighborhood. They never thought of harm of any kind.

Q. Tell us when you saw the wood fall off.

A. I seen it from the bridge, but not at first.

Q. Did the wood keep falling off?

A. Yes; it was scattered all along the road.

Q. Did any fall onto the boy after he fell onto the tugs?

A. I judged from the marks on his face —; he was black and blue all over his face and on his breast. The doctor thought it must have been the wood that struck him.

Q. Was there any wood in the road as you passed?

A. Yes, sir; it was scattered on both sides and all around.

Q. He was bruised on the body?

A. Yes, sir.

Q. Did the wagon strike him any other place except on the head?

A. No, sir.

Q. That was the hind wheel, I believe you said?

A. It was the right hind wheel.

Q. Please tell us how much of a family you have.

A. There is five of us left.

Q. Give us their names and ages.

A. My wife is 49, Annette. My daughter is 19, Mary Furrer. My boy, Joseph Furrer, is 17. Martin Furrer is 10. I am 48 years old.

Q. Now tell us about how much William contributed to the support of the family; but first tell us how large a boy he was.

A. The boy was six feet tall, just. He weighed 165 pounds. He would have been 21 the 28th of October. He was killed on the 15th. He took hold, was the head one of the family, and supported it. If he worked out, he brought in his money and gave it to me

109 to buy what necessaries we used in the family, and he was a good boy, and never a cross word spoken to me. He went on just the same as if he was the father of the house.

Q. Did he have any bad habits?

A. No, sir; never drank a drop of spirits in his life—never touched wine. He was mad if he see a man going into a saloon.

Q. Did you ever find him in a saloon?

A. No, sir.

Q. Who did the farming on your land there?

A. William Furrer.

Q. How many acres have you at your place?

A. Thirty acres.

Q. How much other land do you rent?

A. Last year we had out 22 acres of wheat on another farm.

Q. Who did this work?

A. William Furrer. Last fall he put out 12 acres of wheat on another farm again for this season coming; he done it all himself.

Q. Another farm separate from these two places?

A. Yes.

Mr. SCOTT:

Q. You were not farming three places at one time?

A. Two places. This was my neighbor's farm.

Q. While you were farming this extra 20 acres you didn't also farm another farm?

A. He farmed my farm and another farm adjoining.

Mr. BRUMBACK:

Q. Where was this 12 acres?

A. That is a part of the 20 acres. We put in as much as we like. The lady had 60 acres. I have before that farmed 90 acres in hay, corn, wheat, and oats; but last year I didn't take so much land. These places join.

Q. How many horses do you keep?

A. I had six head; I have five head now; I used to keep six.

110 Q. How many teams?

A. I keep four working horses.

Q. Did the boy do any work with these teams besides farming on this land?

A. He did in the winter time and in the fall, wherever he could get a chance to earn a dollar. He worked on the stone road two years ago with a team.

Q. How much did he get down there?

A. Three dollars and a half for himself and team.

Q. What other work did he do around the neighborhood?

A. He plowed by the day and by the acre, and he hauled timber and hickory butts for a man up there, and as soon as he got home he would say: "Father, here is the money."

Q. Did you ever buy any wood for sale in the city?

A. Yes; I generally would go out and take several cords, and he would bring it to the house.

Q. How much did you buy at a time?

A. Ten or 20 cords, and haul it to the house, and then market it towards evening, in the fall when there was not much to do.

Q. Did he make any profit on that?

A. He has made as high as $2.25 on a cord. That would be clear profit.

Q. Who did that work?

A. Willie Furrer.

Q. When he had no other work on the farm he would do work of this kind?

A. Yes.

Q. What was done with the money that he got?
A. It was used in the family,
Q. How much work can you do?
A. Well, I can chore around. I had to quit my business. I was doing business here in the city. I made artificial legs.
A. What made you quit your business?
A. On account of my poor health I can't stand it.
Q. What are you troubled with?
A. Diarrhea and rheumatism.
111 Q. Can you do any heavy work?
A. No, sir.
Q. Did you help to load that wood that day?
A. Not a bit; I never touched a stick.
Q. How much of an education did the boy have?
A. Well, he had a good, fair education.
Q. Did he have any musical ability?
A. Yes, sir.
Q. What could he do in that line?
A. He was a good violin player.
Q. Who taught him?
A. I did.
Q. Do you play the violin?
A. Yes, sir.
Q. How much could he earn in playing the violin?
A. He would generally get $2 a night.
Q. How is that?
A. He would get $2 a night, and if I went out with him we would get $5 a night—the two of us.
Q. How often did he play around there?
A. During the winter two or three times a week some weeks, and some weeks not so often.
Q. Just as the opportunity offered?
A. Yes, sir.
Q. What did he do with this money?
A. I took it.
Q. It was spent for the family, was it?
A. Yes, sir.
Q. What has been the effect upon your children by the death of your son William, in regard to their working—being required to work?
A. It is just this way: my son Joe has to replace Will., and it takes him away from school.
Q. How old is Joe?
A. Seventeen.
Q. He is doing the work now, is he?
A. Yes, sir.
Q. How about your daughter Mary?
A. She goes to school, but she helps around the barn—milks and helps do the chores. She is not laid away as much as the boy. When I am away she has to stay at home, because the woman is sickly and can't be out much to see to things.

112 Q. Your wife is not strong, then?
A. No, sir.
Q. Before, the boy could stay there part of the time?
A. Yes; he did.
Q. About the time of the accident you had your hands on the board when the wagon pulled away from you. How fast did it go?
A. It went rapidly down the grade.
Q. Could you keep up with it?
A. Oh, no; I could not.

Cross-examination by Mr. SCOTT:

Q. Were you accustomed to drive along this avenue road? Had you been over it frequently?
A. No, sir. That was my first trip, I should judge, in fourteen years. I was a perfect stranger.
Q. Had you gone for the wood over the same way you returned?
A. Yes; I went over the same track for the wood.
Q. When you went for the wood that morning you went over this road and over this crossing?
A. Yes, sir.
Q. What was the condition of the county road there? Was it a turnpike?
A. I didn't notice the road at all.
Q. Do you know whether it is a turnpike?
A. No, sir; I couldn't tell.
Q. You didn't know what condition it was in at all?
A. No, sir.
Q. You didn't notice it at any point in the road?
A. Not going out.
Q. Coming back, did you notice it before the accident?
A. No, sir.
Q. Not at all at any place?
A. No, sir.
Q. You didn't observe whether it was wet or dry?
A. I see going through the woods—I said to my son, "It is a little soft in here; you can't take a very large load."
113 Q. How much wood did you have on?
A. About a cord. We loaded it off from a big pile.
Q. How high were these tiers?
A. I should judge, about three feet and a half high.
Q. What was the width of the load?
A. I guess it was all of four feet on top.
Q. You don't know now whether this was a turnpike or a mud road?
A. It is a mud road. It is stony at the railroad. I don't understand you. Where they fill a grade in they sometimes call it a turnpike.
Q. It is not a macadamized road?
A. No; it is a mud road.
Q. Is it entirely level all the way from where you got the wood to the railroad?

A. Well, yes; pretty much, excepting there at the railroad and the bridge; there was a little sag in there.

Q. When you were going after the wood you thought you would get off and lighten the load?

A. It was not awful soft, but I thought I would get off and lighten it. I says to my son: "I guess I will get off and give you a little lighter load." He said: "You perhaps can't keep up." I said: "I will take hold of the board and steady myself."

Q. You keep two teams?

A. Yes.

Q. How long have you kept two teams?

A. Oh, I have kept two teams a little over two years.

Q. Then four horses is all you keep?

A. I have got five horses now.

Q. Have you kept five horses for the last two years?

A. Some of them were colts; some not used at all.

Q. You have had two teams, though, all the time?

A. Yes; but they wasn't all used at once.

114 Q. Who used those teams?

A. Willie Furrer used the team every day.

Q. Who used the other one?

A. Nobody.

Q. Then you had one team idle all the time?

A. One team was to change off.

Q. You never worked both on the same day?

A. Yes. Sometimes when Joe was out of school he would drag with one team. I kept one team for my buggy—one horse.

Q. You have got one horse besides the working team?

A. No, sir.

Q. You said you had five.

A. Two are sucking colts, and they can't be used.

Q. You have two double teams?

A. Not now. I had when I had my son. I have only got three working horses now.

Q. You had two double teams during his life?

A. Yes, sir.

Re-examination:

Q. How far is your farm from the city limits of Toledo?

A. About three quarters of a mile. The county line is the line of the corporation.

Q. How far is it from here to the city line at the nearest point from Madison street to the city line towards your house direct?

A. I should say it was about two miles.

Q. You say you kept two double teams?

A. Yes, sir.

Q. You have sold one horse since?

A. Yes, sir.

Q. You kept these teams to change off with, did you?

A. Yes, sir.

Q. Do you drive a horse in a buggy when you want to go around?

A. Yes, sir.

Q. What is a boy worth to a farm, in the farming and managing of a farm and taking control and working the land you did,
115 saying nothing about his working with a team and laboring around the neighborhood and earning money, or the money he made as a violin-player or the money he received from hauling wood into town—what was he worth there to the farm to take control and management?

A. To take the whole control—the way he run it—he was worth a two-dollar note every day, and I couldn't have hired a man to do the work for that—to run the place the way I did.

(Counsel for receiver admits that the United States mail directed to the Toledo, Columbus and Southern Railroad Company, received in the city post office at Toledo, Ohio, is delivered at the Madison-street office of the railroad company, and that that office is now under the control of the receiver and was so last October.)

The further taking of this testimony is adjourned to Saturday morning, February 4th.

FEBRUARY 4TH, 1888—9 a. m.

Q. Was your son married?

A. No, sir.

Q. Your family that you have named are his next of kin, with yourself and wife?

A. Yes, sir.

Q. His nearest relatives?

A. Yes, sir.

Q. Look at the photograph marked Exhibit C and tell us where the camera stood when it was taken.

A. It stood up on the wagon looking down.

And thereupon the intervening petitioner, — further maintain his case-in-chief, offered in evidence the photographs hereto attached and marked respectively Exhibit C and D; and thereupon the intervening petitioner rested his case-in-chief.

116 *Testimony on Behalf of Receiver.*

The receiver, to maintain the issues on his part, called as a witness ASHER COOK, who, first being duly sworn, testified as follows:

Direct examination by Mr. SCOTT:

Q. Where do you reside?

A. At Perrysburgh.

Q. How long have you lived there?

A. Fifty-odd years.

Q. What is your business in life?

A. Am a lawyer.

Q. I will ask you whether you had occasion to examine the crossing made by the Toledo, Columbus and Southern road with what is known as the avenue road, in Wood county, Perrysburgh township,

where a young man by the name of Furrer was killed by accident; and, if so, at what time it was that you examined it.

A. I examined the crossings a very short time after the accident occurred. I read the account of it in the Blade in the evening. The next day I went to Bowling Green, over that road, and my attention was called to it by Mr. Brown, and I was requested to look at the crossing and let him know what I thought of it. I stood on the platform as we crossed and examined the road. Whether the train stopped there that morning or not I am not now prepared to say. I have looked at it from the rear platform when the train had stopped and they started up slowly. I have looked at it at other times when the train was moving at regular speed.

Q. From the examination you have made of it I will ask you to state to the master what condition the crossing was in as compared with the crossings of railroad tracks you have seen on other railroads.

(Objected to by counsel for intervening petitioner.)

A. At the time I looked at it I considered it a good, fair crossing. I should call it a fair average crossing. I have seen better and have seen worse.

(Exceptions noted to question and answer.)

117 Q. Was there anything in the appearance of that crossing that would indicate that there was danger in driving a load of wood across it?

(Objected to by counsel for intervening petitioner.)

A. I should think not; not to me.

Q. Or to a railroad man or to a person in charge of a crossing, was there anything there which you think would indicate danger to any one in driving a load of wood across?

A. No, sir; in examining it I thought it was a good, fair crossing, and there was nothing to call my attention to it to indicate danger whatever.

(Exceptions noted to question and answer.)

Cross-examination by Mr. BRUMBACK:

Q. I believe you are the attorney of the Toledo, Columbus & Southern Railroad Company?

A. Not quite so broad as that. I am local attorney.

Q. I mean in Wood county.

A. Yes, sir.

Q. Mr. Brown called your attention to the accident, did he?

A. Yes; he spoke of it, and wished me to look at the crossing.

Q. He thought there might be something in the crossing in causing this accident, did he?

A. I can't tell you what he thought.

Q. You had not said anything to him about the accident until he spoke to you?

A. No, sir.

Q. How long after the accident was it that he spoke to you?

A. I am not prepared to say exactly; very shortly afterward; only a few days; it may have been the next day; it was the day after I read the account in the Blade.

Q. Did you immediately take the train up to the place?

A. I went from Toledo to Bowling Green, and on my way to Bowling Green I met Mr. Brown at the depot here in the city.

Q. You stood out on the platform and looked at it as you went by?

A. Yes, sir.

118 Q. That was the examination you made of the crossing?

A. Yes, sir.

Q. Did the train stop there as you went through?

A. I am not prepared to say whether it did.

Q. Isn't it a fact that the train never stops there unless it is flagged?

A. Unless there were passengers to get off or on, no.

Q. Do you think you could stand upon the platform of a train passing, perhaps without stopping at all, and give an intelligent opinion as to all of the surroundings there that might or might not cause an accident?

A. That is the only manner in which I viewed it, and perhaps the court can tell better whether I viewed it properly. That is the conclusion I came to in seeing it in that manner.

The receiver, further to maintain the issues on his part, called as a witness MALCOLM E. WILLIAMS, who, first being duly sworn, testified as follows:

Direct examination by Mr. SCOTT:

Q. Where do you live?

A. I live in Toledo.

Q. I will ask you if you were called upon by Mr. Brown to make a plat and profile of what is known as the crossing of the Toledo, Columbus and Southern railroad with the avenue road, in Wood county, Ohio, some time last fall.

A. I was.

Q. Can you tell about the time you did it?

A. It was the 22d day of December, I think, 1887.

Q. Did you make that profile and plat in compliance with his request?

A. I did.

Q. I will ask you to look at these papers and say if they are the ones you made.

A. Yes, sir; that is my work.

119 Q. Does that show a correct profile of the mud road with the railroad crossing?

A. Yes; it shows the surface of the travelled road—the travelled surface of the common highway.

Q. For what distance each side of the railroad?

A. It is fifteen feet from there to there (indicating on paper, Exhibit E, between the red lines).

Q. These are fifteen-foot sections?

A. Yes; it is fifteen feet from there to there; this is the width of the road. There is forty-five feet each side of the road where those levels were taken. This is the highway and this is the traveled surface of the common highway. This is a cross-section. You can see the ends of the rails.

Q. This is a correct profile of that much of that territory?

A. Yes, sir.

Q. What is the height of those lines?

A. From there to there represents one foot, and these spaces represent one-tenth of a foot. The vertical scale is a little might exaggerated.

Q. From this profile, how high is the railroad above the main level of the road?

A. It changes.

Q. I mean from here (indicating)?

A. That is 1.4 *tenths* ft. lower there in 30-foot distance.

Q. Now, on the other side, what is the drop?

A. There it is 1.3 in 15, and there in 30 it is 1.9, in 30 feet from the track.

Q. I will ask you to look at this other plat and state what it is.

A. This represents the line of the track and this is just the rough wagon track, and there are planks between the crossing. This represents a ditch on one side of the road. This is the line of the railroad there, and this is the line of the highway.

Q. That is a correct representation made from measure-
120 ments on the ground?

A. Yes, sir.

(Said profile offered in evidence and hereto attached and marked Exhibit E.)

Cross-examination by Mr. BRUMBACK:

Q. Where did you locate your instrument to take those levels?

A. Out in the highway.

Q. I mean on the wagon road, not on the railroad.

A. Oh, I had it, I think, somewhere about here (petitioner's counsel made lead-pencil dot on Exhibit E at point indicated).

Q. Where else?

A. No other place; that is all. I could see it all from there. I had a man hold the level right there and then measured, and then there (indicating), and then I had a man hold the rod there, and there, and there (indicating at red lines on Exhibit E), and took the difference in those readings.

Q. You stood the instrument here?

A. Yes.

Q. And held the rod at each of those red lines of 15 feet apart?

A. Yes, sir.

Q. You didn't set your rod here between these points?

A. No, sir; because I considered the surface had a uniform incline.
Q. You give the incline from each of these points?
A. Yes.
Q. This profile don't pretend to give the exact level between these 15-feet stations?
A. Yes; it does.
Q. You have not set any pole there to obtain the exact height or depth?
A. I certainly have.
Q. I mean between the points (red lines)?
A. Oh, no.
Q. You didn't take any measurements of the fall or rise between these places marked with red lines?
A. No; the surface of the ground appeared to be uniform and I didn't consider it necessary.

121 The receiver, further to maintain the issues on his part, called as a witness W. B. SCOTT, who, first being duly sworn, testified as follows:

Direct examination by Mr. SCOTT:

Q. Where do you reside?
A. 306 Broadway, here in Toledo.
Q. I will ask you whether you are familiar with what is known as the crossing of the Toledo, Columbus & Southern railroad with the avenue road, in Perrysburgh, Wood county, Ohio, where a young man was killed last fall by the name of Furrer?
A. I am tolerably familiar with it. I have drove over it a good deal, and go over it two or three times a week in the course of the year. I heard of the accident, and in going by I looked at it, and have driven over it since. I looked to see what caused anything of the kind.
Q. You were familiar with the crossing during last fall?
A. Fairly so. I had no particular object in examining it, but then I looked at it.
Q. Since the accident you have looked at it specially?
A. Yes, sir.
Q. I will ask you what kind of a railroad crossing it is?
A. I suppose it is like all others. I didn't see anything wrong with it. The road is not as wide as some, but there is plenty of room there to cross with a team.
Q. I will ask you if there was anything in the crossing which would cause a reasonable man to think there was danger in driving across it with a two-horse wagon loaded with wood?
A. I should think not.

(Exceptions noted to question and answer by counsel for intervening petitioner.)

Q. Have you driven much throughout the country here with teams or buggy?
A. I have drove with my own team; yes. I have some horses

and drive frequently. I have been over that road lots of
122 times; very seldom with a heavy wagon, but we hauled our oats over that road this fall with pretty good sized loads.

Q. Are you in the habit of driving over the country and seeing railroad crossings?

A. Yes, sir.

Q. How does this railroad crossing compare with other railroad crossings?

(Objected to by counsel for intervening petitioner.)

A. I think it is all right. I didn't see anything wrong with the road. It has a grade right off smooth there.

(Exceptions noted to question and answer.)

Cross-examination by Mr. BRUMBACK:

Q. When did you first notice the crossing?

A. Right away after I heard of the accident I noticed it especially to see if there was anything the matter with it.

Q. What is your business?

A. I am in the lime and stone business, at Lime City, right above this place.

Q. You are shipping largely over the Toledo, Columbus and Southern railroad?

A. Not largely.

Q. That is the only outlet for your product of stone and lime?

A. Except by team.

Q. You are dependent upon the railroad company for your shipping facilities?

A. If it goes by rail, of course. There is no other railroad there at present.

Q. You say when you heard of the accident you examined it to see what caused the accident?

A. Yes; I naturally wanted to see how such a thing could happen there on the road; that was all.

Q. You wouldn't expect an accident of that kind to happen on a level road?

A. It might as well if they had struck a little stone upon the level road. The incline don't amount to anything.

Q. It would jog the load forward?

A. That would depend upon how it was loaded.

123 Q. And where a cross-piece is laid under the wood, and was driving along the road, you think if it happened to strike a stone it would cause an accident?

A. If the cross-piece was near the center of the wagon, and so it balanced, it might pitch forward.

Q. You think such an accident might occur by striking a stone along the level road?

A. It would depend on how the wood was loaded; it could be loaded so it would pitch forward every time, if it was loaded badly.

Q. You say you didn't see anything wrong with the crossing; the road was smooth, was it?

A. It looked to me to be smooth. Of course, there is a grade there.

Q. You noticed it being pretty steep, down from the railroad to the road?

A. I should not call it steep.

Q. What do you call steep?

A. I should not think it was 15 degrees grade.

Q. What would you call a steep crossing? Show with your hand.

A. I should call anything steep where a team would have to hold back heavily in going down hill. I have driven on wagon roads where they are steep, in California and Idaho and such places. There are no steep pitches in this country—what I call steep.

Q. You are used to driving in the mountains, where they do have steep roads?

A. I have driven there where they had no roads at all.

Q. A man going along on an empty wagon wouldn't see anything in that crossing to indicate that it was dangerous, you say?

A. I don't see how any one could see anything dangerous, with an empty or a loaded wagon, there.

Q. You didn't see anything which gave any warning of any danger there?

A. No, sir; I don't think there is any danger there.

124 The receiver, further to maintain the issues on his part, called as a witness CLARK JOHNSON, who, being duly sworn, testified as follows:

Direct examination by Mr. SCOTT:

Q. Where do you reside?

A. Millbury, Wood county, Ohio.

Q. I will ask you whether you are familiar with the crossing made by the Toledo, Columbus and Southern railroad with the avenue road, in Perrysburgh township, Wood county, Ohio?

A. I have been across there a good many times; yes, sir.

Q. I refer to the crossing where young Furrer was killed by an accident last fall?

A. Yes; I heard there was a young man killed there.

Q. You are familiar with that crossing?

A. I have been across there a good many times.

Q. How?

A. With a team on a load of goods, and——

Q. Had you seen it about the 15th of October, last fall?

A. No, sir; I think later than that.

Q. After the accident?

A. About the 25th of October I was crossing there.

Q. Was your attention specially called to the crossing at that time?

A. I went across there on a load of hay, sir.

Q. Did you know about this accident?

A. Yes, sir.

Q. Did you look at the crossings?
A. Yes; I looked at it because we had heard there had been a man killed there. We were on a load of hay and we were more careful.
Q. How did you find the crossing?
A. I found it to be a good, fair crossing—better than some of the other crossings we had to cross with our load.

(Exceptions noted to the answer.)

125 Q. Did you see anything in that crossing which would to you indicate any danger whatever in driving a wagon loaded with wood—properly loaded—across there?

(Objected to by counsel for intervening petitioner.)

A. No, sir; I should think it was as good if not better than the average railroad crossing.

(Exceptions noted to the question and answer.)

Q. What is your business?
A. Carpenter by trade.
Q. You have seen that crossing several times since then, have you not?
A. Yes, sir.

Cross-examination by Mr. BRUMBACK:

Q. Where do you work?
A. Here in the city in the summer.
Q. Who are you working for?
A. Mike Thompson.
Q. Who is he?
A. Contractor here.
Q. Have you done any work for the Toledo, Columbus & Southern Railroad Company?
A. No, sir.
Q. Haven't you been in their employ?
A. No, sir; I never was in their employ.
Q. Did you ever build any railroad crossings?
A. No, sir.
Q. Ever do any teaming?
A. Yes.
Q. How much?
A. I have worked a good deal of the time teaming. I have worked on a farm for about twenty years.
Q. Where were you going with this load of hay?
A. I was riding with a man.
Q. Who was the man?
A. I couldn't tell you. He was a stranger to me.
Q. What occasion had you to be along there?
A. I was a traveller, going over that road.
Q. What took you there?

A. Well, now, at that time I think I was repairing sewing machines, at the time I went across there on that load of hay.

Q. What was the first you ever told anybody about this crossing there?

A. I don't know, sir.

Q. Didn't you have a talk with anybody about it?

A. I talked with Mr. Brown about it.

126 Q. When?

A. On two or three weeks ago, probably.

Q. How did it happen that you talked with Mr. Brown about it?

A. I couldn't tell now how it was brought up. There was something said that there was going to be a suit about this crossing. He asked me if I had ever been across it. I told him I had.

Q. Where were you?

A. At Lime City.

Q. Working there then?

A. No, sir; I was repairing sewing machines.

Q. Did Brown tell you to go and look at the crossing?

A. No, sir.

Q. You didn't drive only once over with a load of hay?

A. No, sir.

Q. Where were you sitting?

A. About in the middle of the load of hay.

Q. When was the next time you went over the crossing?

A. I couldn't give you the date, but I have been across there a good many times since that.

Q. What were you riding on the first time?

A. I went across on a load of household goods. I was on the hind end.

Q. Were you driving?

A. No, sir.

Q. What were you doing then?

A. In the same business; repairing sewing machines.

Q. When was the next time you went over there?

A. I couldn't say. I have walked across and rode across several times. I went first one way around and then the other way around.

Q. You kept tramping the road back and forth across this railroad crossing to repair sewing machines?

A. Not particular. I used to go across there because it was on my direct route to my work out in that country, where it is pretty well settled.

127 Q. How long were you out there in that country?

A. I couldn't tell you. I didn't put in any steady work there.

Q. You noticed this crossing the first time you went over it—on a load of hay?

A. Yes; that wasn't the first time, though.

Q. The first time after the accident?

A. That wasn't the first time after the accident. I walked over it the first time after the accident on foot, I think, about the 25th of

October. I went over it on the hay, I think, about the fore part of November.

Q. Where were you going when you passed over it on foot?

A. Going to Millbury.

Q. Did you stop there then?

A. Yes, sir; I got off the train there.

Q. Where had you come from?

A. From Dowling or Dunbridge—I think Dowling.

Q. Did you go down and notice this crossing?

A. No, sir; I just walked across.

Q. Did you take any notice about it at all?

A. No; I can't say that I did.

Q. Then the time you noticed it first after the accident was when you were on the load of hay?

A. Yes.

Q. Did the hay stop there?

A. No.

Q. Did you get off and examine the crossing there then?

A. No, sir.

Q. You were sitting in the middle of the load, on top?

A. Yes, sir.

Q. How much hay did they have on?

A. Probably 1,500 pounds.

Q. A good big wagon load?

A. Yes; a fair wagon load. It wasn't loaded very good, either.

Q. Tell about the next time you went over it.

128 A. I couldn't tell you whether it was a load of goods—I went over there in an empty wagon several times. I went through to Perrysburgh once.

Q. Tell about any time that you noticed the crossing particularly.

A. After we heard that this man was hurt we noticed it naturally when we had a load on.

Q. I mean whether it was muddy or whether it had stones on the crossing or anything of that kind. Did you notice all of these particulars?

A. No, sir.

Q. You didn't give it careful examination?

A. I didn't get down off the load to look at it.

Q. When you went over it on the load of hay was there anything said about being careful?

A. No, sir.

Q. Wasn't there anything said about a boy being killed there?

A. Yes; we was talking about it before we got there.

Q. Naturally, after a man had been killed going down there—going over with a big load—a man would take particular care?

A. Yes.

Q. He wouldn't want an accident of that kind to happen to him?

A. No.

Q. You think a man with ordinary sense going over there and knowing somebody had been killed there would be careful?

A. Yes; I think so.

The MASTER:

Q. How was the hay loaded?

(Objected to by counsel for intervening petitioner.)

A. It was loaded very poorly—on one side, like. We set on one side to keep it from going over, because the man spoke about its being a bad crossing.

(Exception noted to question and answer.)

Mr. BRUMBACK:

Q. Did you get on one side to help to hold the hay on?
A. Yes. He said the crossing was better than he supposed it was—after we got over.
129 Q. There was a binding-pole on that load?
A. Yes, sir.
Q. A pole strapped down to hold the hay on the wagon?
A. Yes, sir.
Q. Don't hay generally go sideways when it goes off?
A. Yes.
Q. It don't go endwise?
A. I never saw it, unless it slides off at the end.
Q. You never saw a whole wagon loaded with hay going over endwise?
A. Not without the wagon went down hill endways.
Q. This binding pole was bound down tight across the load?
A. Yes, sir.

The receiver, further to maintain the issues on his part, called as a witness W. H. HARRING, who, first being duly sworn, testified as follows:

Direct examination by Mr. SCOTT:

Q. What is your business?
A. Superintendent and roadmaster of the Toledo, Columbus and Southern Railroad Company.
Q. Did you occupy that position last fall, at the time young Furrer was killed at the crossing of the avenue road?
A. Yes, sir.
Q. I will ask you whether you are familiar with the crossing of your railroad with the avenue road.
A. I am.
Q. Were you familiar with it at the time young Furrer was killed?
A. Yes.
Q. I will ask you how its present condition compares with its condition at that time.
A. Well, the crossing is better than it was before we ballasted it. We ballasted it before that time, say 15 or 20 days, and we made some

repairs—made the approaches a little better than they were before.

130 Q. That is, before the accident?

A. Yes, sir.

Q. How does it compare now with the way it was at the time of the accident?

A. It is just the same; there has not been a thing done to it.

Q. I will ask you whether or not you had instructions as to leaving it or repairing it—anything of that kind.

A. I had instructions not to put any repairs on it—any better ones—after the accident—not to change it.

Q. How long have you been a railroad man?

A. Thirty-five years.

Q. Have you had experience in constructing railroad crossings of that character?

A. Yes, sir.

Q. And are familiar with them?

A. Yes, sir.

Q. I will ask you what kind of a crossing this is as compared with other railroad crossings of the country around.

A. As good or better than the average crossings—railroad crossings.

Mr. BRUMBACK: I ask to have this testimony as to how this railroad crossing compared with other railroad crossings ruled out.

The MASTER: That part may be ruled out.

Mr. SCOTT:

Q. What kind of a crossing is this crossing?

A. I call it a good railroad crossing—wagon-road crossing.

Answer excepted to.

Q. I will ask you if there was anything in the crossing that would indicate that it would be dangerous to drive a loaded team—a team loaded with wood—across it in broad daylight.

A. No, sir.

(Exceptions noted to question and answer.)

Cross-examination by Mr. BRUMBACK:

Q. It was your business to construct this crossing?

A. Yes; it is my business to look after the crossing.

131 Q. Ain't it a fact that the crossing was built under your direction?

A. When the road was constructed, yes.

Q. When you came along there and put the ballast under the track you raised the track, didn't you?

A. We raised the track there, I think, about three inches.

Q. Stone was put all along there under the track at that time, wasn't it?

A. Yes, sir.

Q. Isn't it a fact that the ballasting used along the road there is pretty coarse ballast—it is limestone broken up pretty coarse, ain't it?

A. It answered very well for ballast; but just at that place I instructed the man——

(Objected to.)

Q. The ballast was put on this road in pursuance of—as ordered by the receiver, wasn't it?

A. The receiver didn't order me to do it.

Q. It was done while the receiver had charge of the road?

A. Yes, sir; the stone ballast.

The receiver, further to maintain the issues on his part, called as a witness JOHN ISCH, who, first being duly sworn, testified as follows:

Direct examination by Mr. SCOTT:

Q. Where do you live?

A. In Lake township, Wood county.

Q. Are you familiar with the crossing of the Toledo, Columbus and Southern railroad with what is known as the avenue road, in Perrysburgh township, Wood county?

A. Yes, sir; some.

Q. I refer to the place where young Furrer was killed, when a load of wood fell on him?

A. Yes, sir.

Q. What is your business?

A. Farmer.

132 Q. Are you accustomed to driving along this road and over this crossing?

A. I am whenever I go to Perrysburgh.

Q. Is that frequently?

A. Oh, yes; quite often sometimes.

Q. I will ask you if you drove over it soon after or soon before the time young Furrer was killed.

Q. I drove over it, I think, about two days before that, if I recollect right.

Q. And how soon afterwards?

A. Well, in the course of three or four days, or something of that kind.

Q. Both before and after?

A. Yes, sir.

Q. How were you driving over the road?

A. With two horses and a wagon.

Q. What hauling?

(Objected to by counsel for intervening petitioner.)

A. Tile.

(Exceptions noted.)

Q. Was there any one with you at that time?

A. I had two teams and my boy.

(Exceptions noted to question and answer.)

Q. How old was your boy?
A. He will be 12 years old this month.

(Exceptions noted to question and answer.)

Q. Who were driving the teams?
A. The boy was driving one and I was driving the other.

(Exceptions noted to question and answer.)

Q. You heard of young Furrer's death there, did you?
A. Yes, sir.
Q. Did you look at the crossing after that?
A. I don't know as I looked at it particular—more than I usually did, much.
Q. I will ask you what the condition of the crossing was.
A. Well, I considered it a pretty fair crossing.

(Exceptions noted to answer.)

Q. Were your teams loaded with drain tile?
A. Yes, sir.

(Exceptions noted to question and answer.)

Q. How much of a load did you have on?
A. It was owing to the size. I have had 400 4-inch and I have had as high as 900 and over 2½-inch.

(Exceptions noted to question and answer.)

Q. Driving across this crossing?
A. Yes, sir.
133 Q. I will ask you if there was anything in the condition of the crossing that induced you to think it was dangerous to drive across it.
A. No; I didn't think so.
Q. Or to allow your boy to drive across it?

(Question excepted to — counsel for intervening petitioner.)

A. No. Of course, the boy drove after me on one way. I had no trouble on driving across.

(Answer excepted to.)

Q. No trouble in crossing there with a load of drain tile?
A. No, sir.

Exception noted.

Q. Have you seen the crossing lately?
A. I guess I have seen it about a week or ten days ago.
Q. How did it compare then with the way it was about the time young Furrer was killed?
A. I couldn't see any difference.

Cross-examination by Mr. BRUMBACK:

Q. Did you stop and examine the crossing at any time—get off of your wagon?

A. No, sir.

Q. You just sat on your wagon and drove across it?

A. Yes, sir.

Q. Did you notice any stones there about the time of the accident?

A. I have noticed stones there all along.

Q. Laying in the roadway, weren't they?

A. They were lying—the road was ballasted up with them.

Q. Were they lying in the wagon road, right across the track?

A. Well, I suppose, on each side.

Q. Isn't it the fact that the road is ballasted there with limestones broken into good-sized chunks?

A. I wouldn't say just how big; it is ballasted up with stone.

Q. Ain't there stone there along the railroad pretty near as large as your head?

A. Well, there might be. I didn't take particular notice.

134 Q. When you went over the crossing did you notice the wagon striking stones?

A. Oh, it was rough; the same as it would be over most any crossing; it will jar you.

Q. Didn't you notice it striking stones where they were piled in on either side?

A. I wouldn't say. It might have struck stones. I wouldn't say it didn't.

Q. You noticed its being rough, more or less?

A. Yes.

Q. At the time you speak of—you and your boy?

A. Yes.

Q. What kind of a wagon did you have?

A. An ordinary farm wagon.

Q. The tile were loaded in the wagon-bed?

A. Yes, sir.

Q. You had on about 400 four-inch tile?

A. Yes.

Q. You had end gates in the wagon-bed?

A. Yes.

Q. How high did they come above the wagon-bed?

A. About even. A little bit rounding, some of the loads would be.

Q. And there was no opportunity for them to pitch off from the wagon-bed in the way you had them loaded?

A. No. I put them on at the yard and would load up the wagon.

Q. Just rounding over, and then, of course, in going several miles, they would shake down and get pretty near even?

A. I have had them work back for me and forward, too, when they were too high, and even on a level road.

Q. They can't all slide endwise nor sidewise?

A. No.

Q. Suppose a man would go over that crossing with a cord of

four-foot wood on a load, and the wood was well loaded—loaded tight—and cross-pieces under each end of the rack, to pitch the wood in, well loaded, on the rack, and when he was coming up one side of the crossing the wheels struck these stones lying there and he went down on the other side, the forward wheels being
135 down and the hind wheels up here, if the wood should pitch forward onto the horses and the horses run off, what would you say was the cause of that pitching forward?

A. Well, I don't know. I suppose there has a good many loads went over there since and before.

Q. I ask you a supposable case. Where the wagon was well loaded and came along a level road without any accident, and in going up this crossing and down the other side, and the wood should pitch forward onto the horses just at the time the wheels of the wagon—the hind wheels—were on the top and the front wheels down below, what would you say was the cause of that accident?

A. Well, I think like this: if the wagon was well loaded I don't think there was grade enough there to throw it.

Q. I say supposing it threw it, it would be the steep grade, wouldn't it?

A. I suppose it would be, but it is not steep enough, I think.

Q. When you came over the crossing haven't you noticed that when you came up on one side the horses came up on a slant and the wagon is on a slant?

A. Yes; that is the case with any railroad crossing.

Q. Here is a picture of the crossing. Haven't you noticed when you were coming up here that when the front wheels of the wagon got on the track that the hind wheels are much lower?

A. Yes; naturally it is.

Q. Isn't that the case going down on the other side?

A. Yes.

Q. When the wagon is in that position isn't it much higher?

A. Much higher, of course. Of course it is higher than the general average—that is, the general average of the land. We all know that well enough, but, just to say it in short, I consider it a common crossing. I didn't go to measure it.

Q. The question is, when you go up there isn't your wagon
136 on a considerable of a slant?

A. Of course it is.

Q. Have you ever seen any railroad crossing—farm crossing—except in Wood county?

A. Not that I took notice of. I have seen some in Lucas county.

Q. Do you see those stones lying here on that picture (side of track, Exhibit D)?

A. Yes, sir.

Q. That is pretty coarsely broken stone, is it not?

A. Yes; it is. They look so.

Q. Is that the kind of stones that there is along that track there?

A. I wouldn't say that they looked that way or that I took notice of them that way. They might be. I wouldn't say one way or the other.

Q. You never got off from the wagon and examined this crossing carefully?

A. No, sir.

Q. You don't know how high it is above the road?

A. No.

Q. All you have ever noticed is just simply driving along in a wagon casually and noticing it?

A. Yes, sir.

Q. When you heard of this accident taking place there and this boy being killed isn't it a fact that you were more careful after that when going over it?

A. I didn't take any more care than before. Of course, I took notice of it after hearing of the accident, but at the same time drove across it with no more care.

The receiver, further to maintain the issues on his part, called as a witness JOHN W. MOGLE, who, first being duly sworn, testified as follows:

Direct examination by Mr. SCOTT:

Q. Where do you live?

A. About a mile south of Lime City, Wood county.

137 Q. I will ask you if you are familiar with what is known as the Toledo, Columbus and Southern railroad crossing of the avenue road, in Wood county.

A. I am somewhat; just this fall——

Q. I mean the crossing where young Furrer was killed.

A. Yes, sir; I have been across that quite frequently this summer and fall and winter.

Q. You are familiar with the crossing, then, and was about the time young Furrer was killed there?

A. There was about a week there; I can't recollect that I crossed it inside of the week; inside of 10 days I crossed it, after that.

Q. What were you doing?

A. I was teaming backwards and forwards.

Q. You crossed it frequently with a team?

A. Yes, sir.

Q. Did you examine it after Mr. Furrer was killed?

A. Not particular, I didn't; I paid no attention to it.

Q. You drove a team across it, though, soon afterwards?

A. Yes, sir.

Q. And have driven across it how often since?

A. Oh, maybe 20 times; maybe oftener.

Q. What kind of a team were you driving?

A. Regular road team; a heavy team.

Q. What were you hauling?

A. Some farm produce and some boxes of dry goods.

(Question and answer excepted to by counsel for intervening petitioner.)

Q. Have you hauled any wood?

A. No; I have not. My team has crossed there with bolts, but not with wood. My boy drove the team.

Q. What kind of a crossing does the highway make over the railroad?

(Answered and answer ruled out.)

Q. Describe its condition generally without reference to comparison. Tell the master what kind of a crossing it was.

138 A. It was a fair average crossing. I couldn't see that it was anyways dangerous to me. I did afterwards suppose it was a very bad crossing. I went over it with a high load of boxes and got down and walked over, but I found it was much better than I thought it was.

(Exceptions noted to the answer.)

Q. State whether you could see anything in the crossing—anything which indicated danger in driving a loaded team across there.

(Objected to by counsel for intervening petitioner.)

A. No; I got off just before I crossed the creek and walked and drove over it, because I had a very heavy top load of empty boxes and didn't want to run any risk myself.

Q. You heard of this accident?

A. Yes, sir.

Q. That was the reason you got off?

A. Not exactly; the bridge at the creek was kind of rough, too.

Q. You got off before you got to the bridge?

A. Yes; I didn't want to take any chances from the bridge, either.

Q. I would ask you whether there was anything in the crossing which would indicate that it was dangerous to drive a load of cord-wood across there with a double team, that you could see?

(Objected to by counsel for intervening petitioner.)

A. Well, I believe I would a little rather risk a load of cord-wood than the load I had, because I had a very dangerous load.

(Exceptions noted to the answer.)

Cross-examination by Mr. BRUMBACK:

Q. Have you been talking with any one about this?

A. No, sir; not—that is, only since this suit was commenced.

Q. Who first talked with you about testifying here?

A. I think Mr. Shover, of Lime City.

Q. What did he say to you?

A. He didn't say anything much. I was just merely telling him that I was scared of my load, but found it a little better than I expected.

139 Q. They are likely to magnify a thing of that kind in reporting it around the neighborhood. Isn't that a trait of human nature?

A. Well, I suppose so. I didn't pay much attention to it, of course. I did expect to find a pretty bad place—what I had heard

Q. You expected to find a sudden jumping-off place?

A. Pretty near.

Q. Do you think that is as good a place for a team to pass as it was before the railroad was built there?

A. Oh, no; I don't pretend to say that. There is some rise there that people wouldn't have to go over if it wasn't there.

Q. Don't that rise pretty abruptly when you come up one side and go down the other? Isn't it pretty narrow?

A. I couldn't say that it was narrow, and yet I didn't notice it much. I go over it very well. I cross it very well.

Q. Isn't the grade pretty steep going up and coming down on the other side? I admit that you go over it all right, but didn't you notice that to be the fact there?

A. No; I can't say that I paid much attention to that in that way. I was very careful in driving over it.

Q. You went over slow?

A. Yes, sir.

Q. And held your horses in?

A. Yes, sir.

Q. You had a light load of empty boxes—not heavy?

A. It was top-heavy.

Q. A team coming up with a light load wouldn't pull as hard as if they had a heavy load of wood?

A. No, sir.

Q. If a team was coming up there with a heavy load of wood and exerted itself and was put to its mettle wouldn't it go over at a pretty stiff gait—pretty fast?

A. Yes, sir.

Q. You never got off and examined the crossing, as you say, carefully to see?

140 A. I merely got off. I didn't examine it. I didn't want to leave my team and go away.

Q. It was ballasted with stone on each side of the plank?

A. Yes, sir.

Q. Some of those stones were lying right along here next to the plank?

A. Yes, sir; it was filled up to the plank with stones.

Q. Did you notice the stone ballast on the railroad?

A. Not particularly.

Q. I will ask you whether these stones were not in the wagon road, where you commonly ride, upon the track on each side of the plank?

A. Yes; I think there was some there.

The receiver, further to maintain the issues on his part, called as a witness SAMUEL B. GORRILL, who, first being duly sworn, testified as follows:

Direct examination by Mr. SCOTT:

Q. Where do you reside?
A. At Dowling, Wood county, Ohio.
Q. What is your occupation?
A. Manufacturer of hoops and lumber.
Q. How long have you lived in Wood county?
A. Have resided at Dowling—it will be two years next March.
Q. How long have you resided in that neighborhood?
A. Thirty-eight years. I was born and raised within seven miles of Dowling, in Wood county.
Q. Are you familiar with the crossing made by the Toledo, Columbus and Southern railroad with what is known as the avenue road, in Wood county?
A. Yes, sir; somewhat acquainted with that crossing.
141 Q. I am referring now to the crossing where a young man by the name of Furrer was killed by an accident some time last fall; do you recognize that as the crossing that I have before referred to?
A. Yes, sir.
Q. Have you ever crossed and recrossed that crossing during the past six months?
A. Yes, sir; I have.
Q. This young man was killed on the 15th of October, last fall. Did you cross it any time near about the time of this accident?
A. Yes, sir; I crossed that road in September.
Q. What time in September?
A. I couldn't give you the exact time; it was towards the latter part of September. That was before the accident.
Q. Did you cross it at any time afterwards?
A. Yes.
Q. When?
A. I must have crossed it the latter part of October; can't give you the exact date, but it was during the latter part of October.
Q. Has your attention been called to this crossing since the accident occurred?
A. Yes, sir; in October, quite recently after the accident, after I had seen notice in the paper, I crossed that, and I noticed then. Perhaps thinking about the fact where the young man was killed was the reason I noticed it particular, and then I have been across it and back once since.
Q. What was the condition of that crossing at the time you noticed it?
A. Why, I didn't see anything peculiar about the crossing more than other railroad crossings. I imagine now that it was an average crossing, at least.

(Exceptions noted to the answer.)

—. Was there anything in the crossing that would indicate to you that it was dangerous for a man to drive across there with a load of wood properly loaded?

(Question objected to by counsel for intervening petitioner.)

A. I would not think so.

142 Q. Was there anything in the crossing that would indicate that it was a dangerous crossing, in any shape or form?

(Question objected to by counsel for intervening petitioner.)

A. I would not consider it so; no, sir.

(Exceptions noted to the answer.)

Cross-examination by Mr. BRUMBACK:

Q. Are you an expert on railroad crossings?
A. No, sir.
Q. When you went over the crossing after the accident what were you riding in?
A. At one time I was riding in a two-horse wagon.
Q. I mean at the time you speak of noticing the crossing, the latter part of October.
A. I was riding in a buggy—covered buggy.
Q. Did you get out at the crossing and examine it?
A. No, sir.
Q. Did you stop your buggy when you went over it?
A. No, sir.
Q. It was a casual observation?
A. Yes, sir.

Mr. SCOTT:

Q. Your attention was specially called to it in reference to this accident?
A. Yes; the gentleman I was in company with spoke of it and the top of the buggy was let back.

Mr. BRUMBACK:

Q. You just took a casual look along there as you passed?
A. Yes, sir.

The receiver, further to maintain the issues on his part, called as a witness HENRY R. WARNER, who, first being duly sworn, testified as follows:

Direct examination by Mr. SCOTT:

Q. Where do you reside?

A. Dowling, Wood Co., Ohio.

143 Q. I will ask you whether you are familiar with the crossing made by the Toledo, Columbus and Southern railroad over what is known as the avenue road, in Wood county.

A. Well, sir, I am quite considerably acquainted with it.

Q. I am referring to the place where young Furrer was killed by a load of wood in crossing there.

A. Yes, sir.

Q. At what time have you crossed that and how are you familiar with it?

A. I have crossed it considerable—many times. My folks live at Walbridge, and that is the only way I have of driving down. I have crossed it in the spring, and then I have crossed it during the summer. I crossed it in the fore part of August, and then I crossed it again the last of September and I crossed it again in October; that was the fore part of October, along just before the 10th; just before pay-day, anyway, on the road; and then I crossed it again the latter part of October and once in November.

Q. You have crossed it, then, since the time of the accident?

A. Yes; I have.

Q. Was your attention called to this crossing with reference to this accident in any way whatever?

A. Yes, sir; it was right away after it; I crossed it soon after. It wasn't a week after the accident.

Q. You knew at that time that a young man had been killed there?

A. Yes, sir; that they had had a run-away there.

Q. I will ask you what the condition of that crossing was at any time you have crossed it and at all of the times.

A. Well, sir, I should call it a good, fair crossing; if anything, a little better than the general average of crossings in the country.

(Plaintiff's counsel objected to the latter part of this answer, comparing this crossing with other crossings, and asked to have it stricken out.)

144 Q. I will ask you whether you noticed anything in connection with the crossing to indicate that it was dangerous for a double team hauling a wagon loaded with wood to cross there?

A. Well, sir, I should not call it so; I should not call it dangerous.

(Exceptions noted to question and answer.)

Q. Did you see anything in connection with the crossing at any time you have crossed it which would indicate that it was a dangerous crossing?

A. No; I didn't, only in the spring; but, then, it was fixed after that.

Q. You mean in the spring preceding the accident?

A. Yes, sir; it was a passable crossing then, too.

Cross-examination by Mr. BRUMBACK:

Q. What did you see in the spring?

A. Well, there was nothing out of the way with the crossing in the spring, only just that it was muddy then and the road was bad in that way. It wasn't any worse than any other crossing.

Q. You thought that made it dangerous in the spring?

A. No; it wasn't dangerous.

Q. Hasn't it been muddy at any other times you have crossed except in the spring?

A. No, sir; I never went over it when it was muddy except that one day.

Q. Yet you go home every few weeks during the year—several times a month, don't you?

A. Yes, sir; I sometimes go through there, but I never drive when it is muddy, of course.

Q. You don't go when it is muddy?

A. No.

Q. In the case of wet weather you wouldn't go home?

A. Not with a wagon; I would go down on the cars.

Q. What is your business?

A. Keeping grocery store at Dowling.

Q. What did you refer to pay-day of the railroad for?

A. In any case where you are keeping a grocery you have
145 men that deal at your store that get their groceries at that time.

Q. You look to the railroad company to get your money?

A. No, sir; I don't. The railroad company don't pay me at all. I get paid by the men. If I don't get it out of them I lose it.

Q. Who did you tell that you had been over this road so often, so that they brought you in here?

A. I didn't tell anybody.

Q. How did they happen to have you come here?

A. They asked me what kind of a crossing it was and I told them just the way it was.

Q. Who asked you?

A. Jim Brown.

Q. He is a justice of the peace, isn't he?

A. Yes, sir.

Q. He was around hunting witnesses, wasn't he?

A. I don't know whether he was hunting witnesses any more than he just spoke to me.

Q. There is a photograph of it, isn't it (Exhibit C)?

A. That is not a very good photograph of it.

Q. Is that a photograph of the place?

A. Yes; it looks a little familiar, but there is not as much rubbish there as it shows up there.

Q. That is your opinion about it?

A. That is my opinion.

Q. You think this stone on the track is not there?

A. Well, it is graveled; it ain't heavy stone as that represents, to my eye. It didn't look as large as that to me.

Q. And yet you have passed there frequently?

A. I passed there frequently at the time I told you. That looks familiar, only it shows a little large there, as it would be for the rest of it.

Q. Are you an expert on railroad crossings?

146 A. I don't think I am an expert. I don't know whether you would call me an expert or not.

Q. You have been telling us here all about this crossing. I want to know whether you are an expert on railroad crossings.

A. I don't know whether you would call me an expert or not.

Q. Give us your judgment about that.

A. I have crossed over a good many of them all through the country.

Q. You think, then, you are capable of passing an opinion on every railroad crossing in the country, do you?

A. I can tell my opinion over roads that I have crossed over.

Q. I mean, over those that you have seen?

A. Yes, sir.

Q. You make it your business whenever you cross a railroad to examine the crossing?

A. I generally make it my business to examine it.

Q. You can pass an opinion over every railroad crossing you ever crossed?

A. I think I could.

Q. You make that a specialty, to notice the crossings?

A. No.

Q. How are you going to decide so as to be able to tell about every crossing you ever crossed?

A. Some people notice things more than others. I notice when I go, so I will know when I go over it again.

Q. What makes you notice railroad crossings?

A. If I have to travel over them again I want to know what kind of shape they are in when I go over it.

Q. You want to avoid danger?

A. If there is any danger there I want to know it—on a railroad or anywhere else.

Q. You are always looking out for danger?

A. I always look out to keep myself safe.

Q. And that is the reason you looked at the avenue crossing?

147 A. I looked at it there after the accident occurred, and looked to see how it could have happened.

Q. Had you noticed it before you went over?

A. Yes, sir.

Q. Did you look out for danger then?

A. Yes; but there was no danger.

Q. You say you noticed no danger on this crossing?

A. No, sir.

Q. You were looking out for danger then?

A. I always look to see that there ain't any in any place I drive.

Q. What kind of danger was it you looked for?

A. Nothing particular.

Q. You don't notice every time you go over a bridge to see whether there is danger there?

A. Yes; I do.

Q. Did you get off of your wagon and examine this crossing in October?

A. Yes, sir.

Q. What were you riding in?

A. In a spring wagon. I had some groceries in it.

Q. Did you stop?

A. No, sir.

Q. You just drove along there?

A. Drove along there on the wagon.

Q. Gave a casual look around, did you?

A. Yes.

Q. Did you notice any stone in the crossing—any of these stones right on the sides of the plank, next to the plank, and on the outside, on the approach to the crossing?

A. There was no large ones. Of course, there were some, but not to amount to anything.

Q. Five or six inches square?

A. No.

Q. How large?

A. It was just when they were ballasting it.

Q. I asked you in October?

A. Well, in October.

Q. They didn't ballast in October.

148 A. The ballast was there. In October there wasn't anything bad there. I didn't notice any stones to amount to anything.

Q. Were there any stones there in September?

A. I don't remember of there being any.

Q. When did you notice the stones you speak of?

A. It was nothing, only just this common ballast.

Q. When was it you saw that there?

A. I think it was in——

Q. Give us about the time.

A. It was in October. October I think it was.

Q. You saw some stones lying in the road?

A. No; in the track.

Q. In the wagon road?

A. There was a few lying right along by the track, just as you would put in for a road—to make any road.

Q. Was there any on the side of the plank in there?

A. (Indicating on photograph). No; just right in there (indicating). That is in the road.

Q. You mean you saw stones on the railroad. Is that what you mean?

A. Why, on the railroad; yes, on the railroad.

Q. Then there was no stones there in October—in the wagon road? Is that what you want to tell us?

A. I didn't understand you exactly. (Indicating on photograph). That is the wagon road, and so is this the wagon road.

Q. No; that is not the wagon road in the ditch; I mean along here where the wagons go.

A. Then there was no stones there to amount to anything.
Q. When was that?
A. October. There might have been one or two. I couldn't swear that there were no stones to amount to anything right in that track.
149 Q. Isn't it a fact that you didn't notice whether there was any stones there around in the track?
A. I noticed to see that there was no chance for anything of that kind to occur—why he had the runaway and how it occurred.
Q. Why did you look?
A. To see where this thing had happened and took place.
Q. You was looking to see where he got killed?
A. Yes, sir.
Q. You thought, maybe, this crossing did it, didn't you?
—. No; I didn't think of that. I wanted to see where this runaway was. I supposed all the time it was caused from the scaring of the horses, until I got there, and then they spoke about the crossing.
Q. When you saw the crossing you knew it wasn't the crossing did it?
A. I know it couldn't have been the crossing.
Q. What made you think it was the cars?
A. A man who came along there said it wasn't. He was riding with me.
Q. You don't know who it was?
A. No.
Q. He told you that the cars did it?
A. No; I supposed before this, and he told me that the horses got scared, and the bolts tumbled out and scared them. I didn't know anything about it and he didn't, only he told me that that was the case.
Q. How did you know it wasn't the crossing?
A. Because I saw it was not likely to happen; but it could happen going over any place.
Q. There are some things that might occur that you wouldn't know about?
A. I suppose there is some things that occur that nobody can account for.

150 The receiver, further to maintain the issues on his part, called as a witness ELMER JAMESON, who, first being duly sworn, testified as follows:

Direct examination by Mr. SCOTT:

Q. Where do you live?
A. Half a mile east of Dowling, in Wood county.
Q. I will ask you whether you are familiar with the crossing made by the Toledo, Columbus and Southern railroad over what is known as the avenue road, in Wood county.
A. I have driven across it.

Q. The crossing I refer to is the one where young Furrer was killed some time last fall, in October.

A. Yes, sir.

Q. Have you driven across it soon after or before the accident occurred?

A. I walked across it some time after the accident; I couldn't say just how long it was.

Q. Give it somewhere near the time.

A. It must have been a month and a half or two months after, or perhaps sooner than that; I couldn't say.

Q. Have you driven over there frequently?

A. Yes, sir.

Q. About that time?

A. Yes, sir.

Q. I will ask you what kind of a crossing it is.

A. It is a good average crossing.

(Exceptions noted to the answer.)

Q. Was there anything in the crossing that you observed that it would indicate that it was dangerous for a two-horse team hauling a load of wood to cross there?

A. I didn't see that there was. It is an average crossing—about as other railroads—an average on that road.

(Exceptions noted to the question and answer.)

Counsel for intervening petitioner asks to have latter part of answer, comparing it with other railroad crossings, ruled out.

Q. How long have you lived in Wood county?

A. Eighteen years where we live now, on the same farm.

151 Q. What is your business?

A. Selling implements for Merrill & Co.

Cross-examination by Mr. BRUMBACK:

Q. Have you ever done much teaming?

A. Yes, sir; I teamed all my life until within the last two years.

Q. A cord of four-foot wood on a wagon-rack would come up pretty high above the wheels, wouldn't it?

A. A cord of wood would come about 20 inches above the wheels.

Q. Do you think you can get a cord of wood so it will only come 20 inches above the wheels?

A. If you have a wood-rack. I am speaking of a high-wheeled wagon and not a truck.

Q. Have you ever hauled any wood?

A. Yes, sir.

Q. When you say this is a good average crossing, what do you compare it with—what railroad?

A. With the Ohio Central and the Toledo, Columbus and Southern, and the Hocking Valley. Those three roads I cross frequently. They are in my territory.

Q. Did you notice stones on that road?

A. No, sir; no more than the ballast.

Q. The ballast was there?

A. Yes; when I crossed it the last time. I have crossed it, I think, before it was ballasted.

Q. The ballast that was put on there was on the crossing, so that it was there at that time?

A. Yes; it was there.

Q. Comparing this crossing with the Ohio Central and the Toledo, Columbus and Southern, if they were bad crossings this would be also, wouldn't it?

A. I would say it was an average crossing, as compared with those roads.

Q. If they were bad crossings you would say this was a bad crossing?

A. They are all about an average.

152 Q. If one was bad all would be bad?

A. Well, it is an average crossing with other roads.

The receiver, further to maintain the issues on his part, called as a witness WILLIAM DUPOY, who, first being sworn, testified as follows:

Direct examination by Mr. SCOTT:

Q. What is your business?

A. Railroading—section foreman.

Q. Are you the section foreman who had charge of that portion of the Toledo, Columbus and Southern railroad that crosses the avenue road, in Wood county?

A. Yes, sir.

Q. Did you have charge of that portion of the track about the 15th of October last?

A. Yes.

Q. I will ask you whether the crossing as made there has been changed or moved in any shape since the 15th of October last, when young Furrer was killed there?

A. No, sir.

Cross-examination by Mr. BRUMBACK:

Q. You mean your men have not made any changes in it?

A. No, sir; not in any way.

The receiver, further to maintain the issues on his part, called as a witness HENRY LAUMAN, who, having — previously sworn herein, testified as follows:

Direct examination by Mr. SCOTT:

Q. You have testified in this case before, have you not?

A. Well, before I say anything I want my fees in full—I would like to have it.

Mr. BRUMBACK:

Q. Have you been paid?

153 A. I have been paid $2, but would like to have a little more.

Mr. SCOTT:

Q. I will ask you——
A. Don't I get any more pay?

Mr. SCOTT:

Q. I won't pay you any more. Have you been examined in this case?
(No answer.)
Q. I ask you that question: Whether you have testified in this case before?
(Not answered.)

Mr. BRUMBACK:

Q. Did you demand your fees before you came down here to-day?
A. I demanded my fees, and all the change he had he gave me.

Mr. BRUMBACK: You had better go on and testify, since you are here now.
WITNESS: Well, what do you want of me?

Mr. SCOTT:

Q. I want to know whether you have testified in this case before?
A. Yes, sir.
Q. Where were you at the time this accident occurred?
A. I was right sitting on the platform on the avenue crossing on the Toledo, Columbus & Southern railroad.
Q. Did you see the wagon drive up there and see the accident occur?
A. Yes.
Q. And after the accident happened, where did you go?
A. I went over to Toledo.
Q. How did you come to Toledo?
A. I come on the train; I flagged the train there.
Q. How long after the accident occurred did the train come by?
A. About a few minutes.
Q. Did you have any conversation with the conductor about this accident after you got on the train?
A. I told the conductor what happened.
154 Q. Do you know the conductor's name?
A. I guess I do; I ought to; it was Jim Haley.
Q. Do you know him?
A. I guess I do.
Q. In your conversation with him, did you tell him how the accident occurred, as you saw it?
A. I told him that the wagon went down in the front.
Q. Did you tell him how the accident occurred?
A. I told him——

Q. I will ask you whether you told him that the load of wood was not properly loaded or the accident would not have happened?

A. I didn't tell him that.

Q. What did you tell him?

A. I didn't tell him that the wood wasn't loaded good. I told him that the load of wood come off with the boy and the boy with the wood.

Q. I will ask you whether you told him that there was no piece of wood or bolster or pillow of any kind under the first tier of wood?

A. I didn't say any such thing.

Q. Did you tell him if the load had been properly loaded that the accident wouldn't have happened?

A. I didn't tell him that.

Q. Did you tell him that the way the accident happened was that the boy was sitting on the top of the load of wood, and when he pulled in his horses he pulled some of the wood off of the upper stakes and it fell down with the boy?

A. No, sir.

Q. Did you tell him that there was no stick of wood or bolster of any kind under the front tier of wood?

A. No, sir.

Q. Did you say anything to him indicating that the wood hadn't been properly loaded, or if it had been properly loaded the accident wouldn't have happened?

A. No, sir.

Cross-examination by Mr. BRUMBACK:

155 Q. Was your wife with you at the time you had this conversation with the conductor?

A. No, sir; she was not; she was in the other car.

The receiver, further to maintain the issues on his part, called as a witness JAMES H. HALEY, who, being first duly sworn, testified as follows:

Direct examination by Mr. SCOTT:

Q. Where do you live?

A. At Findlay.

Q. What is your business?

A. Conductor on the C., S. & C.

Q. Were you a conductor in October last?

A. Yes, sir.

Q. Were you conductor at the time *your* Furrer was killed at the crossing made by the Toledo, Columbus and Southern railroad with the avenue road in Wood county?

A. Yes, sir.

Q. I will ask you how soon after the accident you were in that locality?

A. About ten minutes.

Q. In charge of a train?

A. Yes, sir.

Q. I will ask you to state what you saw there.

A. I came to a stop and took on two passengers. One of those passengers was Mr. Lauman, and when the train stopped I got off on the platform. I saw a little pile of wood and four or five men standing away about fifteen feet from that track. I asked Lauman what was the trouble.

Q. This Mr. Lauman that you speak of, is that the man who testified here preceding you and just went out of the door?

A. Yes, sir; I just met him at the door, and he told me that there was a young man by the name of Furrer fell off a load of wood and was dragged along quite a distance there and was nearly dead, he said; he was still living, but very nearly dead.

156 Q. I will ask you whether he said to you that the reason the boy was killed was because the load of wood was not properly loaded.

A. Yes; he said that.

Q. Did he say that the reason it was not properly loaded was because there was no bolster or cross-piece put in front under the first tier of wood that was loaded upon the wagon?

A. Yes, sir.

Q. I will ask you if he said to you at that time if the wood had been properly loaded the accident would not have occurred.

A. Yes, sir.

Cross-examination by Mr. BRUMBACK:

Q. How long have you been in the employ of this company?

A. About four years.

Q. How long have you known Mr. Lauman?

A. I have known Mr. Lauman for about three months.

Q. Did you know him before the accident?

A. Yes.

Q. Where had you met him?

A. On my trains, several times.

Q. Did he tell you his name?

A. Yes.

Q. When was it he told you his name?

A. He told me his name that day that I met him on the train.

Q. I thought you said he told you that prior to that?

A. No, sir; I didn't.

Q. He told you that day?

A. Yes.

Q. You asked him his name, did you?

A. Yes.

Q. You didn't know him before this?

A. Yes; I had known him by sight. I didn't know him by name.

Q. Who was with you when he told you what his name was?

A. There was a lady he told me was his wife.

Q. Was this lady with him at the time he told you these other things you have stated to Mr. Scott?

A. I suppose she was. I don't know.

157 Q. Where was he when he told you that?

A. In the car on the train.

Q. I thought you said you had got off at the platform and said you saw some men and asked him about some things there?

A. No, sir. I got off of the train and saw some men about fifteen feet from the track, and he and the lady got on the train.

Q. Didn't you ask him anything before he got on?

A. Yes.

Q. When did this conversation take place which you have related?

A. In the car, after the train started.

Q. Did you come around and see him about the matter?

A. I had to come around and see him and take up his fare, and we got into conversation about the occurrence, and he told me—he said Mr. Furrer was the young man who was hurt; that him and his father, in loading the wood, being in a hurry, didn't put in any cross-piece in loading their wood.

Q. Did he say he saw it loaded?

A. He said he saw the wood passing; that it was loaded that way; and he said, also, that Mr. Furrer told him that, being in a hurry, he didn't put any cross-pieces under.

Mr. SCOTT:

Q. Which Mr. Furrer?

A. The old gentleman.

Mr. BRUMBACK:

Q. Who told you that?

A. He told me that Mr. Furrer said so.

Q. Is that the exact language he used?

A. Yes, sir.

Q. Do you remember each word distinctly?

A. Well, yes; I think I remember that much of it.

Q. He said Furrer told him that?

A. He said that Mr. Furrer told him that *him*, being in a hurry loading up his wood, didn't put any cross-piece under the front tier.

158 Q. When did you first tell this to anybody—about this conversation?

A. Why, I didn't tell it to anybody until some time after. There were some inquiries made of me if I saw the occurrence and knew about it.

Q. Who asked you that?

A. I think Mr. Brown.

Q. How long was that after the accident?

A. About two weeks, I guess.

Q. Mr. Brown was around investigating this matter, then, two weeks afterwards, was he?

A. I don't know.

Q. Wasn't that what he was doing when he talked to you?

A. He asked me if I knew anything about it or had met anybody that knew anything about the occurrence.

Q. He asked you whether you had been talking with anybody about it?

A. Yes.

Q. He surmised that you might have been asking somebody about it?

A. Yes.

Q. And that turned out to be true, that you had been talking about it?

A. Yes.

Q. Did you ever talk with anybody else about it?

A. No; I think not. Those were the only two passengers that got on the train, and this gentleman, Mr. Lauman, was the only one I talked to about it.

Q. Did you sit down at the time you had this conversation?

A. No, sir.

Q. Where did you stand?

A. I stood in the aisle of the car, and Mr. Lauman, I think, was standing himself.

Q. Was this at the time you went around to take up the tickets?

A. Yes.

Q. And immediately after Mr. Lauman got on the train?

A. It was shortly after Mr. Lauman went into the car. There were only two passengers got on.

159 Q. Both got on the same car together?

A. Yes.

Q. I mean him and his wife.

A. They both got into the same car.

Q. You followed them in?

A. Yes.

Q. Then the conversation took place in that car where Mr. Lauman and his wife were?

A. Yes.

Q. Had you taken his fare before the conversation?

A. I had taken his fare before the conversation.

Q. And immediately commenced talking to him?

A. Yes.

Q. Mrs. Lauman was right there, was she?

A. She was right close by there; I think sitting in the next seat to us.

Q. She could hear the conversation?

A. I think she could if she was listening. I don't know whether she was or not.

Q. You are positive that they were in the same car together?

A. Yes.

Q. How long did this conversation last?

A. It might have lasted four or five minutes.

The receiver, further to maintain the issues on his part, called as a witness THEOPHILUS P. BROWN, who, first being duly sworn, testified as follows:

Direct examination by Mr. SCOTT:

Q. What is your business?

A. General manager of the Toledo, Columbus and Southern railway.

Q. Were you the general manager at the time young Furrer was killed at the crossing in Wood county where your road crosses the avenue road?

A. I was.

Q. I will ask you where the mail that is delivered by the United States to that company is delivered.

A. It is delivered at the general offices of the company, 48 Madison street.

160 Q. Is your office there?

A. Yes, sir.

Q. I will ask you whether you received a postal card or other communication from any one about that time—anywhere six months prior or six months afterwards—calling your attention to the road and the fact that this crossing was in improper shape.

A. I never received any.

Q. I will ask you whether I, as your attorney, served upon you a notice that had been served upon me to produce a postal card calling your attention to this crossing.

A. You did.

Q. Did you make any special examination to find whether any such communication had been received or not?

A. I inquired of all the clerks in the office and also inquired of the superintendent, whose office is at Bowling Green, and they said nothing had come into the office at either place.

Q. I will ask you whether Mr. Ferris, as receiver of the company, ever receives or has supervision of any of the mail received by the company.

A. No; he does not receive it. It goes into the heads of the departments at my office.

Q. I will ask you whether you made diligent inquiry to find out whether any such communication had been received or not.

A. I inquired of every man in the office.

Q. And no such communication, so far as you have been able to determine, has been received?

A. No, sir.

Q. I will ask you further, in reference to this accident, whether you got a copy of the coroner's inquest as made by that officer.

A. I did.

Q. How soon after the accident?

A. Well, I can't say exactly; within a few days.

Q. I will ask you if there was anything in that inquest that made you at once examine into the facts of this case or not.

A. There was; we were charged with criminal carelessness.

161 Q. I will ask you whether it was on the report you received from the coroner that you were induced at that time, immediately after the accident, to make inquiries and start an investigation.

A. Yes; it was.

Cross-examination by Mr. BRUMBACK:

Q. Do you stay in the office all the time down here?

A. Not all the time.

Q. Isn't it a fact that you are out of the city considerable?

A. I am out of the city some; not a great deal.

Q. Ain't you out of the city a great deal?

A. No.

Q. What do you call "some"?

A. Well, to be away over night.

Q. Then you are not away over night?

A. Oh, I am away over night occasionally, but I am home probably nine-tenths of the time nights.

Q. Were you not visiting in New England last fall?

A. Yes.

Q. Were you not in New York also, in the fall?

A. No, sir.

Q. How long were you in New England?

A. In August—until the early part of September; I got home within five or six days, I should say, of the first of September.

Q. Isn't it a fact that you are out on the road occasionally?

A. I am on the road a great deal.

Q. Don't you go down to Columbus at different times?

A. Not often.

Q. When you are not in the office the mail is received by somebody else?

A. Yes, the mail is brought there and distributed onto each desk, whatever department it is to go to, whether the general manager or the freight agent, the auditor, the cashier; each one opens his own mail.

162 Q. Has it ever occurred that other letters that have been sent to your office were never received?

A. Not that I know of.

And thereupon the receiver rested his case.

*Intervening Petitioner's Testimony in Rebuttal.*

The intervening petitioner, further to maintain the issues on his part and by way of rebuttal, called as a witness JAMES HOFFMAN, who, first being duly sworn, testified as follows:

Direct examination by Mr. BRUMBACK:

Q. Do you live in Wood county?

A. Yes, sir.

Q. Are you familiar with what is known as the avenue road?
A. Yes, sir.
Q. Do you know where it crosses the Toledo, Columbus and Southern railroad?
A. Yes.
Q. I will ask you whether you was along said road on or about the 15th day of October last.
A. Yes, sir.
Q. Did you pass over the railroad crossing?
A. Yes sir.
Q. Please state whether you noticed the grade of the crossing and also whether you noticed any broken stone being in the wagon road where it goes over the railroad.

Counsel for the receiver objected to this question, and also to any answer that might be made thereto, for the reason that it should have been introduced in chief, and is not in any sense rebuttal.

Counsel for the intervening petitioner claimed that this witness was introduced to rebut testimony offered by the defendant to the effect that the avenue crossing is a good crossing and in good
163 condition, and also in answer to the statement of witnesses for the receiver that there were no stones there.

Q. How long before the accident in which Mr. Furrer was killed did you pass over the railroad?
A. About five minutes.
Q. State whether you noticed any broken-stone ballast being in the wagon road over the railroad at the crossing.
A. Yes; there was stone there.
Q. How large stones were they?
A. They were all sizes there, pretty near, and they were about all shapes. None of them was very large.
Q. How would they average in size?
A. There was some there from four inches to five or six inches long and about four inches thick—some of them. I didn't measure them.
Q. Did you notice whether the approaches were steep or not?
A. Well, it was generally up and down. It was pretty straight up and down; there was quite a little pitch to it. Of course, a man used to handling a team, he could get over very well.
Q. What would you say about that being a good crossing at that time or not?
A. Well, I don't think it was what it ought to be for a crossing with a heavy load.
Q. Did you see Mr. Joseph Furrer here and his son William as they came along?
A. Yes, sir.
Q. You met them, did you, shortly after you crossed the track?
A. Yes, sir.
Q. Did you notice what kind of a load they had on their wagon?
A. Yes.
Q. I will ask you whether you had known Mr. Furrer before.

A. Yes.
Q. State what kind of wood it was.
A. It was what you call mixed wood—ash and oak.
Q. Wet or dry?
A. Dry wood.
164 Q. State whether there was any bolsters placed under the end tiers at each end of the rack.
A. Yes; there was wood under each end of the tiers.
Q. Cross-pieces?
A. Yes, sir.
Q. Did that have the effect of slanting the wood any way?
A. That is what we put them there for. I have teamed a good deal myself, that is the reason I took notice of his load of wood—because I have handled so much wood myself. I knew he had bought wood over in my neighborhood. I spoke to my hired man and said "That is pretty good wood he has got there" when he went by.
Q. Did you notice how it was piled on the wagon?
A. Not particular. It looked all straight enough, as far as I seen.
Q. It didn't look as though it was going to fall off?
A. No.
Q. It looked about as wood ordinarily does?
A. Yes; the way I should pile it.
Q. Have you been over the crossing lately?
A. Yes; I have been over that crossing twice a day for six weeks—two trips a day.
Q. Have you been teaming over it during the latter part of the fall and early winter?
A. I have been moving my stuff over on my own farm since the first of December.
Q. How would you say the crossing compares as it is now with how it was at the time of the accident?
A. Well, I think that the crossing is some better than it was then, because I think the steady driving back and forth has helped it some, and in muddy weather more or less dirt is carried there and jarred off in striking the rails and naturally deposited there, I should judge.
165 Q. You think there is more dirt there in the approaches than there was at that time?
A. Yes, sir.
Q. Tell us whether you observed any falling off of your wheels on the crossing.
A. Yes; of course you may know the dirt would drop off of the wagon whenever you struck anything solid, more or less.
Q. Tell us whether there are some stones on the crossing there now—as many as there were at that time.
A. I couldn't judge. They might be buried down deeper and it would get smoother.
Q. None are lying loose like they were at that time?
A. No; they are froze in now.

Cross-examination by Mr. SCOTT:

Q. Where do you live?
A. In Wood county.
Q. Have you testified in this case before?
A. No, sir.
Q. What is your business?
A. Farmer.
Q. About the 15th of October how often did you cross here?
A. About every day. I own a farm on both sides of the track.
Q. You were there how soon after the accident?
A. I was not there at all—I was there the next day after the accident.
Q. I thought you said you were there a few minutes after the accident?
A. No, sir; I passed over the road about five minutes before the accident.
Q. Where did you see this load of wood?
A. About fifteen or sixteen rods from the crossing. It was at the edge of the woods I met them. I was going the other way from them; they were coming this way.
Q. You noticed particularly how the wood was loaded?
A. Yes; because I spoke to Mr. Furrer and asked him if he had been down at the hall Friday night. He had agreed with me to go with him Friday.
166 Q. How far from the crossing did you meet them?
A. About 16 rods, I think.
Q. Did the teams stop?
A. No; the boy kept on. He had hold of the rack.
Q. Did you stop your team?
A. Yes.
Q. But the wood wagon didn't stop?
A. No; they just moved on.
Q. You noticed specially that there was a bolster under the front tier?
A. I couldn't help but notice it; it was a pretty big piece.
Q. You did notice it, absolutely?
A. Yes, sir.
Q. How near do you live to Mr. Furrer?
A. At that time I lived about three miles and a half, but now I live about 80 rods, I guess.
Q. Right near neighbors?
A. Yes, sir.
Q. And all this was done while the team was going right by you, without stopping at all?
A. Yes, sir.
Q. Were you there at the accident?
A. No, sir.
Q. Didn't hear of it?
A. I heard of it the next day at noon and went right on home.
Q. You passed them within 150 rods of the crossing?

A. I passed them about 16 rods from the crossing, as near as I can recollect.

Q. You didn't know anything about the accident until the next day?

A. No, sir.

Q. You noticed how the wood was loaded?

A. Yes; I saw that there was four pieces under it.

Q. Just as you drove by?

A. Yes.

Mr. BRUMBACK:

Q. Who was with you?

A. My hired man, Mr. Weseman.

Q. At whose instance were you subpœnaed to come here to-day?

A. By the railroad company.

167 The intervening petitioner, further to maintain the issues on his part and by way of rebuttal, called as a witness HENRY SMITH, who, first being duly sworn, testified as follows:

Direct examination by Mr. BRUMBACK:

Q. What is your business?

A. Deputy sheriff of Lucas county.

Q. I will ask you whether you know the avenue road in Wood county, so called.

A. Yes, sir.

Q. Do you know where it crosses the Toledo, Columbus and Southern railroad?

A. Yes, sir.

Q. I will ask you whether you passed along that road at any time during the fall of 1887.

A. Yes, sir; I can't exactly tell the date. I went over that road some time in September, and previous to that.

Q. Do you know where William Furrer was killed there?

A. I heard he was killed at that crossing.

Q. How did you go when you went along there that day?

A. The first time I drove; the next time I rode out as far as Oregon station and walked along the track; that was, I think, in the fore part of September.

Q. You walked across that crossing in September?

A. Yes.

Q. Did you notice the condition of the crossing at that time?

A. I noticed it some; yes.

Q. Did you notice the approaches to the crossing on each side?

A. Yes, sir.

Q. Did you notice whether there was any stone ballast in the roadway?

A. There was on the side of the road where you crossed over.

Q. Was there any stone lying in the road track?

168 A. There was on one side. I didn't notice both sides as I went over.

Q. Have you observed railroad crossings in general?

A. I have drove over a good many of them.

Q. What would you say as to the condition of this crossing—whether it was a good, fair crossing or a defective crossing?

A. I think that crossing wouldn't be a very good crossing to cross over with a load; a man could get over it with a light buggy well enough.

Q. What would you say as to that wagon road, with a cord of wood and a boy driving on top, whether it was a safe crossing for a load of that kind—four-foot wood, dry wood?

A. No; I should not think it would be.

Q. What would be the danger with a load of that kind?

A. The wagon, if you took a sudden jar or struck some stones, the wagon would naturally run against the horses.

Q. How about driving down the approaches?

A. I only noticed one side; the side on this side where you approach the railroad going towards the avenue—that is, the steep crossing. I mean towards the river (west).

Q. You noticed that as being steep?

A. Yes.

Q. If a wagon loaded with wood was passing along there and the wood was well loaded, and just at the time when it was passing over the crossing and the hind wheel was on the top of the track and the front wheels down the approach, and the wood should slide forward onto the horses and the horses run, what would be the cause?

A. The wagon might strike some heavy obstacle or take a sudden jar and throw the wood forward; if the hind wheels catched, it would naturally throw the wood forward.

Q. Wouldn't that be specially the case if the front wheels were low down and the hind wheels high up?

A. Yes.

169 Cross-examination by Mr. SCOTT:

Q. You are deputy sheriff here now?

A. Yes, sir.

Q. How long have you lived in Toledo?

A. Off and on——

Q. I asked you how long you had lived in Toledo.

A. This last time, eight years.

Q. Where did you live prior to that time?

A. In Swanton township—west of here.

Q. How near to this crossing?

A. It is nineteen miles from here to Swanton, and from here to the crossing about between five and six miles—by the wagon road.

Q. Do you know Mr. Furrer?

A. I have seen him. I have known him to speak to him. I saw him five or six years ago, and have seen him once or twice since. I speak to him the same as I do to anybody else.

Q. You knew him five or six years ago?

A. Yes.

Q. How did you get acquainted with him?

A. By going over on that road. I used to practice medicine years ago and used to have considerable practice in that neighborhood.

Q. Did you ever practice medicine in his family?

A. No, sir.

Q. You knew him while you were practicing medicine?

A. Yes.

Q. What business were you engaged in before you were deputy sheriff?

A. Practicing medicine.

Q. Before you practiced medicine, what business?

A. I have run a farm in Swanton.

Q. In what part of the county is Swanton?

A. In the western part of the county, on the line of Fulton.

Q. How long did you practice medicine in that neighborhood?

A. I commenced practicing medicine in 1869.

Q. Have you been practicing medicine until you were made deputy sheriff?

A. No, sir.

170 Q. What business were you engaged in?

A. In wholesale business on the road.

Q. What business?

A. Roots and herbs, imported goods, juniper, Peruvian bark, lavender flowers.

Q. Wholesale?

A. Yes.

Q. On the road?

A. Yes, sir; we sold them to the trade and they sold them again.

Q. How long have you been in that business?

A. Off and on since 1873. I still have a man who attends to the business for me—an agent.

Q. You were peddling herbs?

A. I said I sold wholesale, roots and herbs. We didn't do any peddling business at all.

Q. It was no peddling business about it?

A. No.

Q. When did you commence selling roots and herbs?

A. I have been in the business since 1873, I said.

Q. Where is your place of business?

A. In the city.

Q. And whereabouts?

A. At my place of residence, on Bancroft street, No. 23.

Q. And that is your wholesale house?

A. We store our goods there.

Q. At your residence?

A. Yes; we sell upon orders altogether.

Q. You sell roots and herbs from your residence on Bancroft street?

A. We keep them there. We sell them and ship them on orders from other firms.

Q. You have no other place of business except your residence?
A. No, sir.
Q. Are you a practicing physician now.
A. Yes—not now; I am not practicing.
Q. You have abandoned the practice?
A. Yes.
Q. What school of medicine were you practicing?
A. The old school.
171 Q. Where did you graduate?
A. In the East.
Q. Where?
A. Philadelphia.
Q. Where?
A. At the American.
Q. Give the name of the institution?
A. The American.
Q. Is that all the name it has?
A. Yes, sir.
Q. The American Medical Institute?
A. Yes.
Q. You are a graduate of that institution, are you?
A. Yes, sir.
Q. And you practiced medicine, then, in Wood county for awhile?
A. Yes, sir; I have had no practice in Wood county lately.
Q. Where have you had the practice?
A. Here in the city. My business that took me to Wood county that time was to see a man on a personal matter by the name of Lininger.
Q. You practiced medicine in Wood county?
A. I have, years ago.
Q. When was the last time you crossed this road?
A. I couldn't give you the date.
Q. You gave him a date?
A. I said in September.
Q. You said early in September?
A. I said the fore part of September.
Q. You have not crossed it since?
A. No, sir.

The intervening petitioner, further to sustain the issues on his part and by way of rebuttal, recalled ROBERT CHAMBERLIN, who, having been previously sworn herein, testified as follows:

Direct examination by Mr. BRUMBACK:

Q. I believe you saw the avenue crossing yesterday?
A. Yes, sir.
172 Q. You testified before that you had seen the crossing along about the time of the accident?
A. Yes, sir.
Q. The next day after the accident?
A. Yes.

Q. Please tell us whether the crossing is the same as it was the day after the accident when you examined it.

Counsel for receiver objected to the question for the reason that he claimed that testimony offered heretofore has admitted that the crossing now is in the condition it was at the time of the accident, and that no issue has been raised on that point.

Counsel for intervening petitioner denied that he had made — such admission whatever, and claimed that his witnesses has stated in examination-in-chief that wagons may have carried dirt in onto the crossing, and that there were not so many stones on the crossing as there were at the time of the accident; that this witness is offered for the purpose of rebutting testimony of defendant to the effect that the crossing is in the same condition now as it was then.

Q. Tell us whether the crossing is in the same condition as it was the day after the accident when you examined it?

A. It is better now than it was at the time of the accident.

Q. In what respects is it better?

A. The stones are not so rough, and at the foot of the grade that kind of a drop-off is not there any more.

Q. Do you think that there are as many stones visible there as there was there at that time?

A. No, sir; the stones are covered with dirt now.

Q. There was no dirt over the stones at that time?

A. Not at that time.

Q. Do you think the grade of the approaches is as steep now as it was then?

A. No; it ain't quite so steep.

173 Q. How is it possible, if there had been no dirt shovelled in there, for the dirt to have accumulated there?

A. Why, the wagons would naturally wear it down in a muddy time.

Q. That would drive the stones down in?

A. Yes.

Q. How could any dirt be carried on there by the wheels, by the wagons? Could there be?

A. Yes, sir.

Q. What is your answer?

A. It might accumulate off from the wagon wheels. I think it accumulated. I think the dirt is shoved down more from the top of the grade.

Cross-examination by Mr. SCOTT:

Q. How soon after that accident did you go there?

A. The next day.

Q. How soon after the accident did you hear of it?

A. I heard of it—a man came in from the avenue to leave Mr. Furrer's folks know of the accident. I met him before he got to them.

Q. That was the same day that the accident happened?

A. Yes, sir.

Q. You heard of it right away?
A. Yes, sir.
Q. Who went after the coroner?
A. Myself and Mr. Ward.
Q. Who took the coroner to the place of the accident?
A. The coroner hired a team.
Q. Did you go with him to the place of the accident?
A. Yes, sir.
Q. You were present when he viewed it?
A. Yes.
Q. Your wife is a cousin of Mr. Furrer's wife?
A. Yes, sir.
Q. You are related to the family to that extent?
A. Yes, sir; by marriage.
Q. I will ask you whether you have had conversation with all of these witnesses who have appeared here on behalf of the plaintiff or not?
A. No, sir; except with the plaintiff.
Q. Mr. Furrer?
A. I have not talked with all of them.
174 Q. How many of them have talked with you? Mention them.
A. That I don't know.
Q. You can mention one?
A. Well, I guess maybe I have talked to Mr. Mandel and Mr. Thurlow, who was witnesses.
Q. You know who they are? Don't you know all the witnesses who have testified for Mr. Furrer?
A. I am not personally acquainted with hardly any of those men who are here.
Q. When did you first talk with Mr. Brumback about this case?
A. I don't know. It may be a month ago.
Q. Do you know whether it is?
A. No; I don't.
Q. Was it before or after this suit was commenced that you talked to him?
A. After.
Q. Did you ever talk to him before the suit commenced?
A. No, sir.
Q. You are the man that brought in that big stone, are you not?
A. Yes, sir.
Q. Brought it in to Mr. Brumback?
A. Yes.

The intervening petitioner, further to maintain the issues on his part, was himself, JOSEPH FURRER, offered as a witness in rebuttal, and further testified as follows:

Direct examination by Mr. BRUMBACK:

Q. Did you tell Mr. Lauman, the day after the accident or at any

time, that in loading the wood there had been no cross-pieces put at each end of the rack under the wood?

(This question was objected to on the part of the receiver as being incompetent.)

A. No, sir.

Mr. BRUMBACK: This evidence is introduced for the purpose of corroborating the statement of Lauman that he had had no
175 such talk with the witness, Conductor Haley, as Haley claims, in regard to the wood being badly loaded.

Mr. SCOTT: The defendant objects, because Mr. Lauman never claimed that he had any such conversation, and denied it.

Q. When was the last time you saw the crossing?
A. I think it is a couple of months ago.

Mr. SCOTT:

Q. You are the complainant in this case, I believe?
A. Yes, sir.

At the request of counsel for plaintiff in this action counsel for defendant, upon his statement that the wife of the witness Lauman is sick and unable to be present and that he considers her testimony important, is willing to admit that she will testify, in substance, as her husband, Mr. Lauman, has already testified.

And thereupon counsel for both plaintiff and defendant stated that they had finished the taking of testimony in this case. The above and foregoing constitutes all the evidence taken on the hearing of said cause before the master under the order of reference therein.

176 EXHIBIT "B."

*Administrator's Letters.*

THE STATE OF OHIO, } ss:
*Wood County,* }

To all who shall see these presents, greeting:

Be it known that by the court of probate of said county administration of all and singular the goods, chattels, rights, credits, and estate which were of William Furrer, deceased, late of said county, deceased, has been granted unto Joseph Furrer, administrator, whose duty it shall be to have all and singular the said goods, chattels, rights, and credits appraised by —— ——, and to return upon oath, within three months, a true inventory thereof; also of the moneys belonging to the said decedent at the time of his death to administer according to law all the moneys, goods, chattels, rights, and credits, and also the proceeds of the real estate of such decedent which may be sold for the payment of his debts which shall at any time come into the possession of said administrator or of any person

for him; to render upon oath a true account of his administration within eighteen months and at any other time when required by the probate court or the law, and failing so to do for thirty days after he shall have been notified of the expiration of the time by the probate judge he shall receive no allowance for services, unless the court shall enter upon its journal that such delay was necessary and reasonable, and to pay any balance remaining in his hands upon settlement of his accounts to such persons as the court or law shall direct.

Seal Probate Court, Wood County, Ohio. Witness my hand and the seal of said court, at Bowling Green, this 6th day of December, A. D. 1887.

FRANK M. YOUNG,
*Probate Judge.*

[Endorsed:] Civ. doc. 7. No. 3040. Probate court. Estate of William Furrer, dec'd. Letters of administration to Joseph Furrer. No. 2, page 188.

(Here follow photographs and diagrams, marked pp. 177, 178, 179, and 180, omitted in printing per stipulation.)

181 Know all men by these presents that we, Joseph Furrer, adm'r, as principal, and Erskine H. Potter, as surety, are held and firmly bound unto James M. Ferris, receiver, and the Toledo, Columbus & Southern R'y Co. in the sum of one hundred dollars; to the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 15th day of October, in the year of our Lord one thousand eight hundred and eighty-eight.

Whereas the above-bounden Joseph Furrer, administrator, has appealed to the Supreme Court of the United States from a decree of the circuit court of the United States for the northern district of Ohio, western division, bearing date the 29th day of June, A. D. 1888, in a cause wherein the said Joseph Furrer, as administrator of the estate of William Furrer, deceased, was an intervening petitioner and the said James M. Ferris, receiver of Toledo, Columbus & Southern Railway Company, respondent:

Now, therefore, the condition of this obligation is such that if the above-named appellant, Joseph Furrer, administrator, shall prosecute his appeal with effect and pay all such damages, costs, and expenses as shall be awarded against him as such appellant therein, then this obligation to be void; otherwise to remain in full force and effect.

JOSEPH FURRER, *Adm'r.* [SEAL.]
ERSKINE H. POTTER. [SEAL.]

Signed and delivered in presence of—

—— ——.

[Endorsed:] No. —. In the — court of the United States for the northern district of Ohio. —— —— *vs.* —— ——. Appeal bond. Approved and filed —— —, 187–. M. Welker.

182 UNITED STATES OF AMERICA, *Northern District of Ohio, Western Division,* } *ss:*

I, Augustus J. Ricks, clerk of the circuit court of the United States for the northern district of Ohio, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had upon the intervening petition of Joseph Furrer, administrator of William Furrer, deceased, filed by leave of court in the case pending in said court for the sale and foreclosure of the defendant railroad, wherein The American Loan and Trust Company is complainant and The Toledo, Columbus & Southern Railway Company and others are defendants, as the same appears from the files and records of said court now remaining in my custody.

Seal of the Circuit Court, Northern Dist. of Ohio.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Toledo, in said district, on this 26th day of November, A. D. 1888, and of the Independence of the United States of America the 113th.

AUGUSTUS J. RICKS, *Clerk,*
By HALLIE W. BROWN, *Deputy Clerk.*

183 In the Supreme Court of the United States, *ss:*

JOSEPH FURRER, Adm'r, Plaintiff,
*vs.*
JAMES M. FERRIS, Rec'v'r, etc., Defendant. } Stipulation.

It is hereby stipulated and agreed by and between the parties to this cause that the photographs and profiles put in evidence in this action shall be placed on file with the clerk of the court for reference herein and it shall not be necessary to reproduce the same in printed record, but it shall be sufficient merely to refer to the same in said record as being on file with the clerk for reference and examination as aforesaid.

And it is further agreed and stipulated that the reproduction of said photographs and profiles in said record being unnecessary, no advantage shall be taken or objection made on account of the same not being reproduced in said printed record.

In testimony whereof witness our hands, at Toledo, Ohio, this 23rd day of September, A. D. 1890.

JOS. FURRER, *Adm'r,*
By O. S. BRUMBACK, *His Att'y.*
JAMES M. FERRIS, *Receiver,*
By A. W. SCOTT, *His Att'y.*

184 [Endorsed :] No. 710. Supreme Court of the United States. 1890, Oct'r term. Jos. Furrer, adm'r, etc., *vs.* Jas. M. Ferris, rec'v'r, etc., *et al.* Stipulation to omit photographs and profiles from record. O. S. Brumback, attorney-at-law, Toledo, Ohio.

[Stamped :] Office Supreme Court U. S. Filed Oct. 20, 1890. James H. McKenney, clerk.

Endorsed on cover: N. Ohio C. C. U. S. No. 710. Joseph Furrer, as administrator of the estate of William Furrer, deceased, appellant, *vs.* James M. Ferris, receiver of The Toledo, Columbus & Southern Railway Company. Filed December 4, 1888.

Please File

—IN THE—

# Supreme Court of the United States

JOSEPH FURRER, as Administrator of the Estate of William Furrer, deceased,

*Appellant.*

—vs.—

JAMES M. FERRIS, Receiver of the Toledo, Columbus And Southern Railway Company,

*Appellee.*

Appeal from the Circuit Court of the United States for the Northern District of Ohio, Western Division.

## BRIEF AND ARGUMENT FOR APPELLANT.

ORVILLE S. BRUMBACK,

*Counsel for Appellant.*

# Supreme Court of the United States, ss.

JOSEPH FURRER, as Administrator of the Estate of William Furrer, deceased,

*Appellant.*

—*vs.*—

JAMES M. FERRIS, Receiver of the Toledo, Columbus And Southern Railway Company,

*Appellee.*

## BRIEF AND ARGUMENT FOR APPELLANT.

### *STATEMENT OF THE CASE.*

It is admitted by both appellant and appellee that upon the 14th day of April, 1886, the case of the American Loan and Trust Company *vs.* The Toledo, Columbus and Southern Railway Company, was commenced in the United States Circuit Court for the Northern District of Ohio, Western Division. And thereafter such proceedings were had by appearance of parties and consent of Counsel, that the said Court having jurisdiction for that purpose did, on the 9th day of April, 1887, appoint James M. Ferris, to be receiver of all the defendant's railway property, consisting of its line of road from the City of Toledo, Ohio, to the City of Findlay, Ohio, with all the equipment, etc., thereof; and did authorize and empower the said Receiver to run and operate said railroad, and authorized him to employ all the help and aid necessary to run and operate the same prudently, and keep the same in good order and repair. Record, p. 2-4.

Upon the 23rd day of June, 1887, upon application of said Receiver, the said Circuit Court did grant him the

further authority to ballast and fence said road. Record, p. 3.

Upon the 15th day of October, 1887, while the said Receiver was so in control and management of said railroad, one William Furrer met his violent death from personal injuries received upon or near the "Avenue Crossing" of said railroad, a highway crossing over the railroad in Perrysburg Township, Wood County, Ohio.

Upon the 15th day of December, 1887, the appellant, as administrator of the estate of said William Furrer, deceased, by leave of the Court duly obtained for that purpose, filed his intervening petition against the appellee to recover damages for the said death of William Furrer as having been caused by the negligence of the appellee in ballasting, etc., the railroad at the "Avenue Crossing."

The issues made upon said intervening petition were referred to a Master and he thereafter duly filed his report in Court. (Record, p. 5.) To this report appellant by his counsel filed his exceptions, (Record, p. 8) which were overruled by the Court and said report confirmed.

This appeal is prosecuted to obtain relief from the said action of the Court below in confirming said report.

## *PRELIMINARY.*

Appellant's case was heard below before a Special Master, and is one of those too numerous instances where a party is substantially denied a jury trial by reason of the personal injuries complained of being inflicted while a railroad is being operated by a Receiver.

The system of watered stocks and excessive bonded indebtedness employed in railroad manipulation, has resulted in the Federal Courts being called upon to frequently operate railroads through Receivers, for whose carelessness the remedy to be had is only through the favorable attitude of a Special Master.

In this connection the vigorous language of that eminent jurist, the lately deceased Justice Miller is *apropos*, not as sustaning his dissenting opinion in the case in which it was employed, (the questions therein involved are now settled by statute) but as showing the evils complained of, is by no means a new one. Barton *vs.* Barbour, Receiver, etc., 104 U. S., 126.

He said: "Of the many thousand miles of railroad in my judicial circuit, and of the fifty or more corporations who own or have owned them, I think I speak within limits in saying that hardly half a dozen have escaped the hands of the receiver. If these receivers had been appointed to sell the road, collect its means and pay its debts, it might have been well enough. But this was hardly ever done. It is never done now. It is not the purpose for which a receiver is appointed. He, generally, takes the road and all its appurtenances out of the hands of the company which is its owner; operates the road in his own way, with an occasional suggestion from the court, which he recognizes as a sort of partner in the business; sometimes, though very rarely, pays some money on the debt of the corporation, but quite as often adds to the sum of these debts, and injures the prior creditors by creating a new and prior lien on the property pledged to them."

That the Federal Constitution as well as those of the several states intend to guarantee to every citizen a fair and impartial trial by jury is unquestionable. And the fact that the equity jurisdiction of the Federal Courts has substantially abridged that right in requiring cases like appellant's to be heard by a Special Master rather than a jury is none the less reprehensible because it is founded upon the implied authority of the judiciary.

As said by Justice Miller in the case above quoted:

"Not only this, but the right of trial by jury, which has been regarded as secured to every man by the Con-

stitutions of the States and of the United States, is denied to the person injured, and he is compelled, though his case be one with no element of equitable jurisdiction in it, to submit it to a court of chancery or to one of the masters of such a court.

"In actions for personal injuries, which have always been considered as eminently fitted for a jury, and especially in the assessment of damages, this constitutional right is denied because it is a Receiver of a railroad and not its owners who has done the injury."

The injustice that has resulted all over the country by reason of this practice undoubtedly led to the enactment of the late Statute, authorizing Receivers to be sued and a trial before a jury had without the permission of Court; but it does not go far enough to remedy all the evil, by *requiring* the Receiver's Court to submit all questions arising upon cross complaints (such as appellant's) to a jury for determination.

Jones *vs.* East Tenn. Va. & Ga. R. R. Co., 128, U. S. 443.

There is no good reason why a jury trial should not be had and allowed against a Receiver as well as against any other defendant in Court, the Court would have as much power to remedy and correct wrong in one case as in the other. The practice of referring such cases to a Master (*Amicus Curiae*) together with the notorious custom of confirming his report in almost every instance, has impressed the public and Bar of the country as one of the defects in the judicial machinery, by which one man is brought in to abridge rights with little hope of relief from his errors. It is certainly a great hardship to be concluded by the opinion of one man (the Master) when there is much room for differences as to the conclusion which may be drawn from the facts.

Shearman & Redfield on Negligence, Section 54, 114, Sioux City, etc., R. R. Co. *vs.* Stout 17 Wall 657.

## *ARGUMENT.*

The grounds upon which appellant bases his claims for relief in this Court, are those set forth in the twelve grounds for exception to the Masters Report found on pages 8 and 9 of the printed record. We will consider these grounds *seriatim:*

1ST AND 2D GROUNDS—MISCONDUCT OF THE MASTER.

The first and second grounds as set forth in said exceptions relate to the misconduct of the Master. He says in his report:

"In order to determine whether the receiver was guilty of negligence in maintaining this crossing, the Master heard testimony as to the nature of the traffic on the highway as to its former condition, and by consent of council and for his own satisfaction he made a personal inspection of it and of *other crossings through the same section of the country. The Master was satisfied from said inspection that said crossing was not a dangerous one and was in passable condition. If it is proper and competent to compare it with other highway crossings on the same road and through the same section of the country, it can fairly said to be a good average road crossing.*".

Counsel for appellant denies that he ever gave any consent for such an unprecedented and unwarranted proceeding, and sets forth in his affidavit, (Record, p. 10,) just what he did consent to, and that only. No reply under oath to said affidavit was filed by either the Master or Counsel for appellee, and the affidavit that does appear must be taken to truly state the facts as to what consent was given.

That the Master was guilty of misconduct in making personal inspection of crossings other than the Avenue crossing admits of no question. It would have been misconduct for him to have even examined the Avenue crossing without the permission of Court or consent of counsel.

Thompson & Merriam on Juries, Sec. 354.

Deacon *vs.* Shreve, 22 N. J. L., 176.

Stampofski *vs.* Steffens, 79 Ill., 303.
State *vs.* Sanders, 68 Mo., 202.
Haywood *vs.* Knapp, 22 Minn., 5.
Thompson on Trials, Secs. 904. 906.

How much more reprehensible is it for him to institute a comparison between railroad crossings around the country on his own volition. A party is entitled to hear the evidence in open Court upon which his rights are to be adjudicated. Such action would deny to him this essential element of Magna Charta. This wrongful action alone of the Master should be ample reason for setting aside his report in this case.

3D. GROUND—"AVERAGE CROSSING."

As a result of the Master's trip around the country in the examination of the Avenue Crossing, and "other crossings through the same section of the country," he reports:

"The Master was satisfied from said inspection that said crossing was not a dangerous one and was in passable condition. If it is proper and competent to compare it with other highway crossings on the same road and through the same section of the country, it can fairly be said to be a good average road crossing."

There was testimony brought out in the cross-examination (and necessary re-examination) of one witness by counsel for appellee, (Record pp. 47, 50, 51,) that a crossing upon the Ohio Central R. R. was not as bad as this Avenue Crossing; and much testimony was taken and considered in defense, against the objection of the appellant, that the Avenue Crossing was a "fair average road crossing." Record pp. 79, 83, 85, 95, 99, 104. All of which we submit was utterly incompetent and erroneous in law, as well as prejudical to appellant.

The authorities are numerous that the admission and consideration of this testimony as well as the basing any finding upon it is error, as much as it was for the Master to personally inspect other crossings.

Cleveland, Lorian, etc., R. R. Co. *vs.* Fredenbur, 3 Ohio Circ. Ct., Rep. 23.

A witness was not allowed to state how a bridge in question compared in respect to condition and repair with other bridges. Bliss *vs.* Wilbraham, 8 Allen, 564.

So evidence as to how an article (Fire hose) contracted to be furnished, compared with similar articles made by others was held inadmissible. City of Chicago *vs.* Greer, 9 Wall, 726.

In the case of Johnston *vs.* District of Columbia, 118 U. S. 19, where a municipality was sued for damages resulting from a defective sewer construction, and it was sought to institute a comparison between the sewer in question and other sewers, this Court held the testimony was clearly inadmissible.

Likewise in the late case of Albany, etc. Steel Co. *vs.* Lundberg, 121 U. S., 451, where the issue was the quality of certain iron, involving the amount of phosphorus in it, evidence as to the amount of phosphorus in other iron, was held by this Court to be wholly irrelevant. Mr. Justice Gray in delivering the opinion of the Court said:

"Under these circumstances, evidences of the amount of phosphorus in iron made in 1880, and the general expressions of opinion as to the excellence of the pig iron and the care taken in its manufacture did not render the evidence competent, *but rather tended to divert the attention of the jury from the real issue*, which was whether the particular iron tendered by the plaintiff to the defendant conformed to the express warranty in the contract between them.

"The case differs from that of Ames *vs.* Quimby, 106, U. S., 342, where, in an action to recover the price of shovel handles sold to the defendant, evidence of the good quality of other like handles sold by the plaintiff at the same time was admitted, accompanied by direct evidence that the latter were of the same kind and quality as the former.

"The testimony being irrelevant and incompetent, and manifestly tending to prejudice the defendants with the jury, its admission requires the verdict to be set aside; and it becomes unnecessary to consider the rulings upon other evidence and upon the question of damages."

The care that must be exercised by one railroad Company is not merely such care as other railroad companies exercise.

Wabash R. R. Co. *vs.* McDaniels, 107, U. S. 454.

Cayzer *vs.* Taylor 10, Gray, 274.

Where a suit was brought for damage by reason of constructing a railroad near a Summer hotel, it was held incompetent to show that railroads near other hotels were not a damage to them.

Laflin *vs.* C. W. & N. Ry. Co., 34 Fed. Rep., 859. See also Kerr *vs.* South Park Commissioner's 117 U. S. 379.

Somerville, etc. R. R. Co. *vs.* Doughty, 2 Zab. 495.

Concord R. R. Co. *vs.* Greely, 3 Foster (N. H.)245.

So in cases of suit for injuries caused by defective sidewalks, it is held incompetent to show that other sidewalks in the vicinity were out of repair, etc.

Dundas *vs.* City of Lansing, 75 Mich., 499.

Or that the sidewalk in question was like other sidewalks.

Baur *vs.* Indianapolis, 99 Ind., 56.

Temperance Asso. *vs.* Giles, 33 N. J. L., 260.

But this testimony here is even more objectionable than that in most of the cases cited. It is only the *conclusion* of the witness upon all the surroundings of the different crossings. As expressed in one case, "The witness is allowed to roam through the evidence for himself, and gather the facts as he may consider them to be proved, and then state his conclusion concerning them."

Dolz *vs.* Morris, 17 N Y. Sup'r Ct. 202.

See Rogers on Expert Testimony, 36, 37, 38.

The judgment of witnesses is not, as a matter of law,

to be accepted or substituted for that of the jury.

Head *vs.* Hargrave, 105, U. S. 45.

See also Chicago & Alton R. R. Co. *vs.* Springfield & Northern R. R. Co., 67 Ill. 142.

Twigley *vs.* Cowgill 48 Me. 294.

Hill *vs.* Portland, etc. R. R. Co. 55, Mo. 444.

Muldowney *vs.* Illinois Central R. R. Co., 39 Iowa, 615.

Where the facts from which negligence is sought to be inferred are within the experience of all men of common education, the jury or Master must determine the question without the aid of experts.

Shaftet *vs.* Evans, 53, Cal., 32.

A witness cannot state his opinion whether a highway was, or was not, defective or dangerous where the accident happened.

See Record pp. 79, 82, 83, 85, 89, 91, 95, 98, 99, 104.

Lester *vs.* Pittsford, 7 Vt. 158.

Crane *vs.* Northfield, 33 Vt. 124.

Rockford *vs.* Hildebrand, 61 Ill. 155.

Ryerson *vs.* Abington, 102 Mass. 531.

Montgomery *vs.* Scott, 34 Wis. 338.

Griffin *vs.* Willow, 43 Wis. 509.

Barnes *vs.* Newton, 46 Iowa 567.

Albion *vs.* Hetrick, 90 Ind. 545.

Experts (?) will not be allowed to state their opinion in matters of common knowledge, such as the peculiar liability of property from its situation, to fire.

Milwaukee & St. Paul R. R. Co. *vs.* Kellogg, 94 U. S., 649.

Schmieder *vs.* Barney, 113 U. S., 645.

A witness ought never to be allowed to swear to inferences without stating the train of reasons by which his mind has been conducted to them.

The Nereide, 9 Cranch, 388.

Dushane *vs.* Benedict, 120 U. S., 630.

We must conclude, therefore, that the fact that the

Avenue Crossing compares favorably or unfavorably with other crossings in that section of the country had no relevancy to the case. (They all may be bad, Record, pp. 105.) And the Master in giving consideration and basing his whole Report upon it (as shown by the Report itself) committed grevious error.

4TH GROUND—FINDING OF THE NATURE OF THE STONES UPON THE CROSSING.

The fourth ground relied upon by appellant for setting aside the Master's Report, is the finding upon the weight of the testimony, that the stone ballast placed by the appellee upon the crossing consisted of stones "broken to a fair size," and that "one or two pieces of unreasonable size were produced, but the weight of testimony is that the stones in the roadway were of fair size and not dangerous to public travel."

There was not one *iota* of testimony adduced by appellee in defense as to the size and nature of these stones negligently placed and left in the wagon road over this crossing; all the testimony upon the subject was that produced by appellant and found in the Record, pp. 23, 25, 26, 27, 31, 32, 34, 35, 38, 39, 45, 52, 53, 54, 55, 58, 59, 72, 83, 90, 92, 96, 113, 114, 120, 121, which establishes beyond question that these stones were large chunks of limestone of various size, some of large dimensions, others smaller, *but would average "larger than a man's fist," from "three to four inches square."* (Larger than half a brick.)

The only testimony in answer to all this testimony of appellee, was the incompetent and irrelevant statements of numerous witnesses, that the crossing was a "fair average crossing" "not dangerous," etc.

The testimony shows that on the day of the accident it was bright clear weather, the roads hard and dry;(Record, pp. 17, 20;) and had been so during the Fall. Record, p. 34.

The road was smooth and level with no ruts in it or rough places, except what was made by appellee. Record, pp. 29, 30, 40.

And the grade to the crossing was steep and abrupt for that kind of a country. Record, pp. 21, 23, 25, 28, 33, 34, 35, 36, 44, 50, 52, 55, 58, 72, 78, 81, 82, 93, 117, 122. Made so by appellee and left in that condition for a long time. Record, 33, 34, 89.

In the face of this testimony and that the appellant had cast this course ballast (large stones) upon this steep, smooth and hard railroad crossing, and allowed it to remain there a long time, for wagons to strike in passing over; thus making a veritable man-trap for a traveler upon a load of wood (as in the case at bar,) without any competent testimony to excuse or palliate the negligence; the Master makes the remarkable finding that the weight of the testimony is, that the stones in the roadway (on this hard incline) were of fair size and not dangerous to public travel. His conclusion is contrary to what most men would decide upon that testimony. It is contrary to what the Township Road Supervisor determined in regard to the crossing before any accident had ever happened. Record, pp. 12, 13, 14, 15. And is certainly opposed to what the Justice of the Peace acting as Coroner determined, *after viewing the ground*, and hearing the testimony of witnesses immediately after the accident. Record, pp 53.

5TH AND 6TH GROUNDS—OTHERS PASSING OVER THE CROSSING IN SAFETY.

The fifth and sixth objections made to the Master's Report, is his action in taking and considering testimony against the objections of council for appellant, relative to *others passing over the crossing* at times remote to the happening of the event complained of in this action. He says in his report:

"It was contended very earnestly in the argument that the fact that the accident happened at that point under

the circumstances named, is *prima facie* evidence of a bad crossing and of negligence; but the proof shows that many other teams loaded with wood and more cumbersome and unwieldy articles frequently passed over the same crossing without accident, which, on the same line of reasoning, would indicate that the crossing was reasonably safe for the ordinary traffic carried on over it. The same line of reasoning would lead to the conclusion that inasmuch as other parties frequently drove equally cumbersome loads over this crossing without accident that the driver in this case was not careful, or that his wood was not well loaded, or that he was sitting in an unsafe place on the wagon."

That the testimony upon which this finding is based would never have been admitted in open Court under the rules of evidence scarcely requires the citation of authorities. Its reception and consideration can only be accounted for upon the principle that a special Master can *commit no wrong*. And under his equity powers is supreme in his authority.

An examination of all the testimony taken on behalf of appellee found in the Record pp. 78 to 112, must certainly convince any fair minded individual that the only defense made below was, that in the opinion of the witnesses called, the Avenue crossing was "not dangerous," was a "fair average railroad crossing" and others had passed over it in safety with various kinds of loads.

The only evidence as to what they knew about the condition of the crossing at the time they passed over it was adduced by Counsel for appellant in cross-examination and it invariably appeared that no close or special examination had ever been made, that the witnesses had merely ridden by there on trains, on wagons, etc., without any careful investigation.

The weight of the evidence is not made up, nor does it depend upon the number of witnesses, but on the mat-

ter sworn to and the position of the witnesses and their attention and capacity to hear and see.

Chicago, R. I., etc. R. R. Co. *vs.* McKean, 40, Ill. 220.

The object of this evidence that others had passed over the crossing in safety was to raise a *presumption* of the safety of the crossing at that time, and *from that presumption to persume* that the crossing was safe at the time William Furrer attempted to pass over it upon a load of wood on the 15th day of October, 1887. *The jury or Master can only consider presumptions founded on facts and not those based on presumptions.*

Philadelphia City Ry. Co *vs.* Henrice, 92, Pa. St. 431, 434; Gillespie *vs.* McGowan, 100 Id. 144; Sorenson *vs.* Menasha, etc. Co., 56 Wis. 338; Northern Central R. R. Co. *vs.* State, 54, Md. 113.

Evidence to establish extraneous facts upon which to base presumptions is not competent. You cannot thus try questions remote to the case.

Philadelphia City Ry. Co. *vs.* Henrice, 92, Pa. St. 431.

Where it was sought to excuse a charge of negligence in running cars too fast by proving that other cars ran in the same manner. Held not competent testimony.

Schierhold *vs.* North Beach & Mission R. R. Co., 40, Cal. 447.

So where it was sought to prove negligence by showing the commission of similar negligent acts, held incompetent.

Maguire *vs.* Middlesex R. R. Co., 115, Mass. 239.

Eppendorf *vs.* Brooklyn City etc. R. R. Co., 69, N. Y., 195.

Thus, evidence that similar railroad accidents had happened at other places on the same railroad, held to be incompetent.

Hipsley *vs.* Kansas City, etc. R. R. Co., 88 Mo. 348.

So, in an action against a railroad company for injuries received in an accident at a crossing, it is not competent to ask plaintiff whether he had not met with other

accidents, caused by careless and negligent driving. Shoemaker *vs.* New York Cent. R. R. Co., 50 Hun. 602.

As laid down by Mr. Black in his late admirable little work on "Proof and Pleading in Accident cases," pg. 52.

"At the trial of action to recover damages for injuries caused by negligence, the evidence must be confined to proving facts at the time, place and circumstances attending the injury and the negligence of the parties then and there; but what occurred to others at other times, more or less remote, or what were the surrounding circumstances at times other than at the particular occurrence under investigation is collaterable and inadmissible."

7TH GROUND—NOTICE TO APPELLEE OF DEFECTIVE CROSSING.

The Master in his report finds "The Road Supervisor had sent a notice to the Receiver that this crossing was not safe, but it is not established that he received such notice; on the contrary, there is evidence to show that he did not receive it."

The evidence shows uncontradicted that the Township Supervisor had notified the Section Boss upon the Avenue Crossing section, that the crossing was bad and needed repairs. Record, pp. 14, 15. That notice producing no results, a letter (postal) was duly mailed to the defendant, Record, pp. 15, and in ordinary course of mail was undoubtedly delivered at the office of the defendant in Toledo. T. P. Brown, General Manager, testified *he* never received the card, but it might very easily have been delivered at the office to others in charge in his absence. How much more of a notice it is incumbent upon the public to give a railroad company for the protection of life and property? No notice is in fact necessary here to make the company (or Receiver) liable; it is bound to know the condition of its own property and the state of repair of its highway crossings, especially when it causes the defect therein, itself. *The defect*

*having been caused by the company (Receiver) itself, it will be held to have notice of its character and existance.*

Elliott on Roads and Streets, 462 644.

Village of Jefferson *vs.* Chapman, 127, Ill. 438.

Warsaw *vs.* Dunlap, 112 Ind. 576.

Birmingham *vs.* McCary, 84 Ala. 469.

Atlanta *vs.* Buchanan, 76 Ga. 585.

Adams *vs.* Oshkosh, 71 Wis. 49.

Kunz *vs.* Troy, 104 N. Y. 344.

Cusick *vs.* Norwich, 40 Conn. 375.

The duty of discovering and remedying the defect is imperative and absolute under the Statute. Notice to the defendant was not necessary. The presumption of negligence arises from the defects themselves.

Worster *vs.* Forty Second St. Ry. Co., 50 N. Y. 203.

Shearman & Redfield on Negligence, Secs. 13, 46,

Rockwell *vs.* Third Ave. R. R. Co., 64 Barb 438.

In view of the notice to the Section Boss and the written notice to the company's headquarters from men who foresaw the dangerous condition of this crossing prior to any accident. And in view of the fact that the appellee made and placed this crossing in the dangerous condition it was and maintained it in that way for weeks and months, would fairly seem to approach very closely to the verdict of the Justice at the inquest, viz: "*Criminal* or "*reckless negligence*" upon the part of the appellee.

8TH GROUNG—THE REPORT AS A WHOLE.

The appellant, for an eighth ground of objection to the Master's Report, excepts to the report as a whole upon the ground that it is contrary to and not sustained by the law or the evidence. And especially excepts to the general finding that "said crossing as established and maintained was reasonably safe for the traffic passing over it and was not at the time of the injury in such an unsafe and dangerous condition as to have caused the injury complained of." And that appellant is not entitled to damages in this proceeding.

We will discuss in this connection—

(a) The general principles of Law applicable to the case and then

(b) The weight of the testimony.

(a) THE LAW OF THE CASE.

It is the duty of railroads in Ohio, by express statute to mainiain safe and sufficient crossing, and are liable for *any* neglect or carelessness in construction work, or keeping in repair.

Revised Statutes of Ohio, Sec. 3324 (in force at the time of the accident) reads as follows upon this subject: (Italics our own) "*A company or person having control or management of a railroad* shall construct or cause to be constructed and maintained in good repair on each side of such road, along the line of the lands of the company owning or operating the same, a fence sufficient to turn stock; and before operating such road *shall cause to be maintained at every point where any public road, street, lane or highway, used by the public crosses such railroad safe and sufficient crossings*, and on each side of such crossings, cattle-guards sufficient to prevent domestic animals from going upon such railroad, *and such company or person shall be held liable for all damages sustained in person or property in any manner by reason of the want or insufficiency of any such fence, crossing or cattleguard, or any neglect or carelessness in the construction thereof, or in keeping the same in repair;* provided, that where any road now in process of construction, or any proposed road, passes through any enclosed land that the company or person having control of any such road shall during the construction of the same, provide suitable crossings for the owner or occupant of each farm, and make, and keep in repair fences along the line of such road through such enclosed fields as are necessary to keep stock within the limits of such enclosed fields, and protect any crops growing thereon; and further provided, that where the com-

pany or person agrees with the owner of the land through which any railroad passes that said owner shall build and keep in repair any portion of the fencing, and should said fencing be destroyed or damaged by fire from passing trains, said company or person owning or operating such road shall rebuild, or repair said fence; provided, the property holder should demand it."

This duty with respect to a crossing necessarily includes the approaches thereto.

Louisville etc. R. R. Co. *vs.* Smith, 91 Ind. 119.

Farley *vs.* C. R. I. & P. R. R., 42 Ia. 234.

Maltby *vs.* Chicago etc. R. R. Co., 52 Mich. 108.

In the latter case the statute was substantially the same as the Ohio Statute.

Under such a statute the duty even extends to keeping approaches to a bridge over the track in repair.

Carter *vs.* B & P. R. R. Co., 139 Mass. 525.

Hayes *vs.* N. Y. C. & H. R. R. Co., 9 Hun. 63.

The Appellee, Receiver, owed the same duty toward the public and is liable to the same extent as the Railroad Company would have been, had it been operating the road.

Potter, Receiver, *vs.* Bunnel, 20 Ohio St. 150.

This latter case is very similar in many of its features to the case at bar.

Railroad crossings are to be restored by the company to as *passable condition* and so kept by the company, as is *consistent* with the use by the company.

Rorer on R. R. pp. 456, 545.

Little Miami R. R. Co. *vs.* Conr's Greene Co., 31 Ohio St. 338, 347.

Elliott on Roads and Streets, 599.

A railroad company must if possible construct its road *without inconvenience to the public*, but if this cannot be done, it must be constructed with the *least possible inconvenience*.

Louisville & Nashville R. R. Co. *vs.* State 3 Head Tenn. 523.

Shearman & Redf. on Neg. Sec. 414.

And will be liable for a defect in the construction of a highway crossing, or not keeping it in repair.

Mann *vs.* Central Vt. R. R., 55 Vt. 484.

Wasmer *vs.* Delaware etc. R. R. Co., 80 N. Y. 212.

Payne *vs.* Troy etc. R. R. Co., 83 N. Y. 572.

Spooner *vs.* Delaware etc. R. R. Co. 115 N. Y. 22.

Farley *vs.* Chicago etc. R. R. Co., 42 Iowa 234.

Thompson on Neg. pp. 357 and cases there cited.

Revised Statutes of Ohio, Sec. 3324.

It is the duty of the company to place a railroad crossing in such condition as not to *interfere with the usefulness* of the highway, and when in construction work, the approaches are interfered with, they must *as far as possible* be left in as good condition as they were before the railroad was built.

State *vs.* Dayton etc. R. R. Co., 36 Ohio St. 434.

Gulf. Colo. etc. R. R. Co. *vs.* Greenlee, 62 Tex. 344.

Evansville etc. R. R. Co. *vs.* Carvener, 113 Ind. 51.

People *vs.* Chicago etc. R. R. Co., 67 Ill. 118.

Roberts *vs.* Chicago etc. Ry. Co., 35 Wis. 679.

It is the duty of a railroad company at *Common Law*, independent of Statute, to so construct its road as not to interfere with the *convenient* use of the highway.

People *vs.* C. & A. R. R. Co., 67 Ill. 118.

Northern Central R. R. Co. *vs.* Baltimore, 46 Md. 425.

Mann *vs.* Central Vt. R. R. Co., 55 Vt. 484.

Shaber *vs.* St. Paul etc. R. R. Co., 28 Minn. 103.

Spooner *vs.* Delarware etc. R. R. Co., 115 N. Y. 22, 31.

Thompson on Neg. pp. 357.

Elliott on Roads and Streets, 600.

But the duty in this regard is made even more obligatory by express Statute in most of the States.

People *vs.* N. Y. C. etc. R. R. Co., 74 N. Y. 302.

Roberts *vs.* C. & N. R. R. Co., 35 Wis. 679.

Johnston *vs.* P. & S. R. R. Co.. 10 R. I. 365.

Greer *vs.* C. C. & D. R. R. Co., 43 Iowa 83.

North Central R. R. Co. *vs.* Balto. 46 Md. 425.

Little Miami R. R. Co. *vs.* Com'rs, 31 Ohio St. 338.

Revised Statutes of Ohio Sec. 3324.

Failure to perform a duty imposed by Statute or City ordinance is *per se prima facie* Negligence, i. e. in case of injury, upon proof being made of such failure, it will afford presumptive proof of negligence.

Thompson on Neg. 558. 1232.

Field *vs.* C. B. & Q. R. R. Co. 14 Fed. Rep. 332.

Shearman & Redfield on Neg. Sec. 13.

Liddy *vs.* St. Louis R. R. Co. 40 Mo. 506.

Baltimore City Ry. Co. *vs.* McDonnell 43 Md. 534.

Karle *vs.* Kansas City etc. R. R. Co. 55 Mo. 476.

O'Mara *vs.* Hudson River R. R. Co. 38 N. Y. 445.

Correll *vs.* Burlington etc. R. R. Co. 38 Iowa 120.

Messinger *vs.* Pate, 42 Iowa 443.

Chicago etc. R. R. Co. *vs.* Boggs, 101 Ind. 522.

McGrath *vs.* New York Central etc. R. R. Co. 63 N. Y. 522.

Hanlon *vs.* South Boston etc. R. R. Co. 129 Mass. 310.

Worster *vs.* Forty Second etc. R. R. Co. 39 La. An. 139, 145.

The basis of this rule is that every man has a right to rely on the belief that every other person will perform his duty and obey the law.

Jetter *vs.* New York & Harlem R. R. Co. 2 Abb. App. Dec. 458.

Langhoff *vs.* Milwaukee etc. Ry. Co. 19 Wis. 515.

"The doing of an unlawful act subjects the doer to every consequence which flows from it. This is a principle of universal operation, and founded in good sense and public justice. He stands in a different light from one who does a legal act, but does it so imperfectly that it may occasion injury. In the one case there is a positive and reckless contempt and defiance of the com-

mands of the law; whilst in the other, a mere carelessness, which, however culpable, is free from the charge of wilfulness."—Orwings *vs.* Jones 9 Md. 108.

This duty to perform a statutory requirement applies with peculiar force to any duty enjoined for the *safety of a highway*; it being held that a failure to keep a highway in repair is negligence as a matter of law.

Thompson on Neg. 344.

The rule is based upon the idea of the paramount right of the public to a safe and unobstructed use of the highway, and of the inherent wrongfulness of any interference with this right.

Dygert *vs.* Schenck, 23 Wend 446.

Irvine *vs.* Wood, 51 N. Y. 224.

Sexton *vs.* Zett, 44 N. Y. 430.

Storrs *vs.* Utica, 17 N. Y. 104.

Congreve *vs.* Smith, 18 N. Y. 79.

Creed *vs.* Hartman, 29 N. Y. 591.

Anderson *vs.* Dickie, I. Robts. 238.

Pfau *vs.* Reynolds, 53 Ill. 212.

Nelson *vs.* Godfrey, 12 Ill. 20.

As said in a late Indiana case, Evansville etc. R. R. Co. *vs.* Crist. 116 Ind. 454.

"This statute (crossing) prescribes a plain duty. Indeed, the duty existed independent of the statute, but the statute makes it all the more clear and positive. The right to interfere with a highway is coupled with the duty to make it as safe as it was before it was disturbed, or, at least, to use reasonable care and skill to do so. This duty is violated if there is a failure to restore it to its former condition, in all cases where the exercise of reasonable care and skill can effect a restoration. The rule which governs cases of this class is thus stated by a writer of acknowledged accuracy and ability: "Whenever an act is authorised to be done in highway that would otherwise be a nuisance, the person or company to whom the power is given is not only bound to exercise it strictly

within the provisions of the law, but also with the highest degree of care to prevent injury to the persons or property of those who may be affected by such acts. Hence, where a railroad has been permitted to lay its tracks along or across a highway, it is bound to the use of every reasonable precaution to prevent injury to those passing along the highway, or crossing its track that is laid along or across the highway, and if it fails to exercise a proper degree of care,—not only such as is provided by statute, but also such as is rendered necessary by the character of the obstruction and its location, having reference to a like reasonable exercise of care on the part of those approaching the obstruction—it becomes a nuisance to the extent of its injury to individual rights, and renders the company liable in damages for all the consequences." (2 Wood Railway Law, Section 271.) And as said in another Indiana case, (Wabash, etc. Ry. Co. *vs.* Locke 112 Ind. 404.) "A defendant who, in violation of an express statutory duty, places or causes an obstrction in a highway, will not be heard to say that he did not anticipate an injury, which was the direct result of his unlawful act, when the person injured was without fault."

And as laid down in 2 Shearman & Redf. on Neg. Sec. 359.

"Where one has a license to interfere with a highway, as where a railroad company is authorized to lay its track along, under or over a highway, the terms of the license, so far as it directs the manner of such interference, must be strictly complied with. Interference in any other mode is a public nuisance."

Per consequence, where there is a statutory duty to perform such as keeping a "safe and sufficient crossing" a railroad company is *bound at its peril to exercise great care in so doing*. If it fails so to do in the absence of contributory negligence, and injury results, if shown only by circumstantial evidence, the company must answer in damages.

C. R. I. & P. R. R. Co. *vs.* McKean, 40 Ill. 220.

If a person is injured at a crossing, evidence is admissible to show the road is not in as good condition as it was prior to the railroad being built, as affecting the measure of duty upon the part of the railroad company.

Funston *vs.* C. R. I. & P. R. R. Co., 14 Lead. R. R. Cases 640.

Field *vs.* C. B. & Q. R. R. Co. 14 Fed. Rep. 332.

In the latter case, a failure to maintain a sign-board at a railroad crossing as required by Statute was said to be conclusive evidence of negligence upon the part of the railroad company. The statute in the case is in effect the same as the Ohio Statute above cited.

Where a railroad company left a crossing in such wise that the wheels of a vehicle had to rise a few inches above the surface of the highway to pass over the rails, it was held *prima facie* a negligent interference with the use of the way.

Evansville etc. R. R. Co. *vs.* Carvener, 113 Ind. 51.

As a general rule of law where several concurring acts or conditions of things, one of them a wrongful act or omission produce an injury, such wrongful act or omission is to be regarded the approximate cause of the injury, if the injury be one which might reasonably be anticipated from the act or omission and which would not have occured without it.

Campbell *vs.* City of Stillwater, 32 Minn. 308.

The case of Willey *vs.* Inhabitants of Belfast, 61 Me. 569 is a case very similar in many of its features to the case at bar. There as here the accident was proximately caused by stones lying in the roadway. The carriage wheel of plaintiff striking them caused the bolt which held the whiffletree to fall out, and the whiffletree dropping upon the heels of the horse so frightened it as to cause it to run away and throw out the plaintiff inflicting severe bodily injuries. The court in sustaining a judgment for plaintiff against the town said: "It was all one catastrophe, from the passing of the wagon wheels over the rock

and rut and the detachment of the whiffletree till the plaintiff struck the ground."

See also Baldwin *vs.* Turnpike Co., 40 Conn. 238.

In the late work of Elliot on Roads and Streets pp. 448 and fol. the cases of personal injuries caused by the concurring circumstances of horses running away and obstructions in street are collected and discussed. On page 449 the law as deduced from a large number of cases is laid down as follows:

"Where a horse of ordinary gentleness becomes frightened at objects naturally calculated to frighten horses, which the corporation has negligently placed, or permitted to be placed and remain in the highway, and injury result, without contributory negligence, the corporation will, as a rule, be liable therefor."

Brookville etc. Turnpike Co. *vs.* Pumphrey, 59, Ind. 78.

City of Atlanta *vs.* Wilson, 59 Ga. 544.

Fritsch *vs.* Allegheny, 91 Pa. St. 226.

Card *vs.* Ellsworth, 65 Me. 547.

North Manheim *vs.* Arnold, 119 Pa. St. 380.

Elliot on Roads and Streets 451 reaffirms Shear. & Redf. on Neg. Sec. 346 as follows:

"It is a general rule that 'where two causes combine to produce an injury to a traveler upon a highway, both of which are in their nature proximate, the one being a culpable defect in a highway, and the other some occurrence for which neither party is responsible, the municipality is liable, provided the injury would not have been sustained but for such defect.' This rule has been applied in many cases, and in some of them cities have been held liable under very peculiar circumstances. Thus, where the plaintiff stepped into a hole in the sidewalk and was thrown on a railway track, and, in attempting to get up caught his clothes on a spike in the sidewalk, which held him until he was struck by a passing train, the city was held liable. Chicago *vs.* Schmidt, 107 Ill. 186. So where a traveler's horse was frightened

by a defect in the way, and breaking loose, ran into another traveler, it was held that the injury to the latter was the natural and proximate consequence of the defect, for which the town was liable. Merrill *vs.* Clermont, 58 N. H. 468.

"In another case the plaintiff was driving down hill on a road by the side of a precipice; his horses ran away through an opening in the railing and went down the precipice. It was held that the mere fact of his horses running away would not prevent a recovery unless he was guilty of a want of reasonable care or skill, which was a question for the jury to determine. Sherwood *vs.* Hamilton 37 Upp. Can. Q. B., 410. So where the plaintiff in trying to free his horse from a defect in the road was struck by the horse's head and injured. The defect in the way was held the proximate cause of the injury. Page *vs.* Buckport, 64 Me. 51. These illustrations might be multiplied, but enough have been given to show the current of judicial opinion."

No serious attempt was made upon the hearing to prove any contributory negligence upon the part of William Furrer, and the master substantially finds in his report that no such negligence is chargable.

It is well settled, however, that the burden of proving contributory negligence rests on the defendant and it will not avail him unless it has been established by a preponderance of the evidence.

Indianapolis etc. R. R. Co. *vs.* Horst, 93 U. S. 291.

Washington etc. R. R. Co. *vs.* Gladmon, 15 Wall 401.

Baltimore & Ohio R. R. Co. *vs.* Whitaker, 35 Ohio St. 627.

Pennsylvania R. R. Co. *vs.* Weber 76 Pa. St. 157.

The plaintiff is only bound to use "ordinary care" his failure to take unusual care will not constitute contributory negligence.

Village of Jefferson *vs.* Chapman, 127 Ill. 438.

Shearman & Redfield on Neg. Sec. 86 and fol.

And the presumption is he exercised this care.

Shum *vs.* Pennsylvania R. R. Co. 107 Pa. St. 8.

While the neglect of a railroad company to perform a statutory duty does not absolve a party from using care, (ordinary) such neglect will however, exonerate him from using as high a degree of care as would otherwise be required under all the circumstances.

Wabash, St. L. & P. R. R. Co. *vs.* Wallace, 110 Ill. 114.

Shearman & Redfield on Neg. Sec. 62.

The plaintiff is not bound to prove more than enough to raise a fair presumption of negligence upon the part of defendant and that injury resulted therefrom.

Shearman & Redfield Neg. Sec. 58 and cases cited.

Payne *vs.* Troy, etc. R. R. Co., 83 N. Y. 572.

Northern Pacific R'y Co. *vs.* Mares 123, U. S., 710.

The plaintiff is not bound to prove his case beyond a reasonable doubt or so clearly as to exclude the possibility of any other theory.

Shearman & Redfield Neg. Sec. 58.

Whitney *vs.* Clifford, 58 Wis. 156.

(Judging by his report the Master entertained a contrary view.)

In a large class of cases the accident speaks for itself *res ipsa loquitur*. The fact of the accident and the attendant circumstances may be sufficient in themselves to raise a presumption of negligence, such as to cast upon the defendant the burden of establishing his freedom from negligence.

Shearman & Redfield Neg. Secs. 58, 59, 60 and cases cited

Eggleston *vs.* Columbia Turnpike Co., 82 N. Y. 278.

The spreading or breaking of rails has been held presumptive evidence of a defective track.

Knapp *vs.* Sioux City, etc. R. R. Co,, 65 Iowa, 91.

Cleveland, etc. R. R. Co. *vs.* Newell, 104 Ind. 264.

Peoria, etc. R. R. Co. *vs.* Reynolds, 88 Ill. 418.

And the breaking down of a bridge presumptive evidence of negligent construction or maintenance.

B. & O. R. R. Co. *vs.* Noell, 32 Gratt 394.

So the sticking up of a spike in a railway track.

Fash *vs.* Third Ave R. R. Co.. 1 Daily 148.

Likewise where a guy rope of a derrick was allowed to sag across a street so low, as to be struck by a street car in such a manner as to knock down the derrick and crush a man, the court said:

"We are not laying down a rule that negligence may always be inferred from the mere fact of personal injury by means of an agency under control of the party charged. We mean only to say that there may be ways of inflicting injury which are so easily and naturally guarded against by a moderate degree of care or forethought that they seem to be inseparable from an exhibition of the opposite qualities; and that so a rational inference of negligence may arise from the manner of the injury alone."

Hunt *vs.* Missouri R. R. Co., 14 Mo., App. 160, 172.

To permit a freight car to stand on a side track so near the main track as to cause a collision with an approaching train will afford a presumptive case of negligence.

Farlow, Receiver *vs.* Kelley, 108, U. S. 288.

Likewise that a turn table was a dangerous machine was inferred from the injury which actually occured to the plaintiff.

Sioux City, etc. R. R. Co. *vs.* Stout, 17 Wall. 657.

See also The Mabley *vs.* Atkins, 14 Wall 204.

Germania Ins. Co. *vs.* Lady Pike, 21 Wall 1.

(b) THE WEIGHT OF THE TESTIMONY.

The uncontradicted testimony shows upon the part of the appellant, and uncontradicted by appellee:

1. That Joseph Furrer is the duly appointed and qualified administrator of William Furrer, deceased.

2. That William Furrer was killed at or near the Avenue crossing of appellees Railroad as alleged in the petition

3. That when he was so killed he was driving a load

of four foot cord wood, that the wood slid forward upon his horses just as the load was descending the crossing approach on the further side and when the wheels of the wagon were striking coarse pieces of rock ballast, placed there by appellee, that the wood thus sliding upon the horses caused his horses to run away, killing the young man.

The fact that the wood slid forward just at the time the wagon was going down the descent of the approach would fairly indicate *prima facie* that the approach was detective, in the absence of any contributory negligence.

There is no evidence whatever, to show any such contributory negligence and the Master finds none. On the contrary, the undisputed testimony is that the wood was well loaded and the deceased was driving his horses in a careful manner.

Witnesses for defendant all say there was nothing in the approach (from casual examination) to give any warning of danger, and therefore the deceased was under no obligation to exercise any unusual care or caution.

But there is more than this *prima facie* evidence that the Crossing was defective. There is also:—

a. The testimony of a large number of witnesses shows that it was too steep a crossing. In fact, was thought to be so before the accident occurred, and upon that account express notice personally, and by letter, was given appellee to repair it.

b. Witnesses for both appellant and appellee agree that there was stone ballast, the pieces of which were of unusual size lying uncovered upon each side of the railroad track, directly in the crossing approaches, which the wheels of wagons including that of deceased, would and did strike, and that the said stones were placed there and maintained by the roadmaster of the appellee. See Record p. 89. This of itself is sufficient under the authorities above cited to make out a *presumptive* case of negligence against appellee, such as to entitle to a re-

covery in the absence of competent proof exculpating appellee.

4. Can there be any reasonable doubt whatever that the cause of this deplorable accident was the combination of the unnecessarily steep approaches to this crossing and the stones upon it? One or both of these causes was the moving factor in urging that dry wood to slide forward with William Furrer upon his horses. He had driven his load two or three miles upon a level road and no suspicion of danger, or apprehension that the wood might fall. But when his team gets upon this crossing and the wheels strike the stones loosening up the load, the horses laboring to get up the steep, start down the other side rapidly before they can be checked, just then a wheel strikes stones as large or larger than a half of a brick, and is it anything wonderful or contrary to nature that the wood pitches forward and the tragedy is enacted almost in a moment of time?

The accident did take place just as the Road Supervisor and others feared might occur.

True, the stones upon this crossing approach were not a "roaring lion" in the highway giving notice of the danger to those passing that way, but were all the more to be feared upon that account. It is just such slight, but subtile dangers, that give rise to the greatest catastrophes. The books are full of cases where the causes of the injuries sustained are as innocent as insignificant in their appearance as those in the case at bar. Municipal corporations have been held responsible for such slight defects time and again, although the law as applied to them ought fairly to be more lenient than as applied to corporations for profit.

Where there was an inequality in a street between a plank and cement pavement of 2½ inches, over which plaintiff stumbled and was injured, it was held such a defect as to entitle plaintiff to recover against the city.

Glantz *vs.* City of South Bend, 106, Ind. 305.

Likewise, where a water box extended 1½ inches above the surface of a sidewalk, the City had to respond in damages.

Indianapolis *vs.* Cook, 99 Ind. 10.

So a depression of a stone in a stone pavement of five inches was held to be such evidence of negligence as to require the case to be submitted to the jury.

Goodfellow *vs.* Mayor, etc., of New York, 100, N. Y. 15.

A City was held negligent because of a hole a foot deep in a street.

Minick *vs.* Troy, 83, N. Y. 514.

And a judgment for damages that resulted from a paving stone being loose was affirmed.

Turner *vs.* City of Newburgh, 109, N. Y. 301.

So where an obstruction (stump) projected above the surface of the street, six inches high and four inches in diameter causing plaintiff to stumble and fall, a judgment against the city was affirmed,

Mayor *vs.* Scheffield, 4 Wall. 189.

See also injury caused by a person stumbling over an engineer's stake driven in a street.

Gudger *vs.* Western, etc. R. R. Co., 87, N. C. 325.

Where a railroad company instead of properly restoring the highway to its former condition, left its rails projecting 4½ inches above the surface of the street, it was held liable.

Wasmer *vs.* Delaware, etc. R. R. Co., 80, N. Y. 212.

So a spike sticking up in a street railway track.

Fash *vs.* Third Avenue R. R. Co., 1, Dailey 148.

And a small splinter on the rail.

Rockwell *vs.* Third Ave. R. R. Co., 64 Barb 438. Affirmed 63 N. Y. 625.

Likewise where a space of 3¼ inches was left between the planking and the rail.

Payne *vs.* Troy, etc. R. R. Co., 83, N. Y. 572.

In the case of Spooner *vs.* D. L. & W. R. R. Co., 115, N. Y. 22. Where the space between a plank and a rail at

a railroad crossing was 2½ inches and a child's foot was caught therein so that a car passed over it; the court in sustaining a verdict for $20,000 held that while it appeared that such an action had never before occurred in the history of the company, its possibility was quite obvious and that a submission of the question of defective construction to the jury was not error. See also Virginia Cent. R. R. Co. *vs*, Sanger, 15, Grat 230.

What evidence does the appellee adduce in answer to all the evidence of appellant that the wood was carefully and properly loaded. The two Studer boys and Joseph Furrer so testify. Weseman and Huffman say the wood was all right when they passed the Furrers just before they reached the crossing. Lauman, and his wife, who it is admitted, would testify same as Lauman, Record p. 122, say the wood was all right, (and the boy was driving carefully) until started down on the further side.

All the evidence in answer to this testimony is a weak attempt to impeach Lauman by the evidence of Conductor Haley, that Lauman told him the wood was not well loaded. Lauman and Mrs. Lauman both deny any such conversation. And his evidence that the wood was well loaded is sustantiated by the other witnesses named.

The evidence is thus overwhelmingly that the wood was well loaded and the *prima facie* case of the appellant in no wise shaken but on the contrary corroborated, that the accident was the result of defects in the crossing.

The only other attempted defense made by the testimony of appellee consists in the statements of so called *experts* that in "their judgment" the crossing is a "fair average crossing" and did not present any dangerous features to view. To say that this crossing averages with other crossings is no defense whatever,—for the reason that the other crossings may be alike defective, or not have the secret sources of danger that this one did. Neither is it any defense to say there were no danger-

ous features present to view in the make up of this crossing. It might not be so dangerous to an ordinary load passing but it was a veritable man-trap for a load like the one William Furrer was driving,(a common load in that level country) and it was only a fortuitous circumstance that prevented the father also from being carried down to his death. Record p. 70.

The question, is, was the decedent killed there as alleged, and was the crossing so constructed and allowed to remain in such a condition as to cause or contribute proximately to his death? If so, in the absence or contributory negligence appellant can recover. It makes no difference whether the defects in the crossing are apparent or not. If they in fact existed, that is sufficient.

It follows that the appellant here is entitled to recover upon his *prima facie* case, even admitting all the statements of the appellee's witnesses that it is an "average crossing, etc." But appellant denies these statements and we submit the weight of the testimony is, (outside of the facts of the *prima facia* case) that it is not a good, fair, or average crossing and that there were defects in it apparent to any careful observer, viz: approaches were too steep, and large pieces of stone were negligently placed and left uncovered directly in the hard wagon track. The court will observe that all of appellant's witnesses upon these points testify to having carefully and closely examined the crossing, whereas all of the appellee's witnesses admit that they were mere casual observers driving by upon loads of hay, in wagons, upon trains, etc., not even stopping at the crossing to take in all the surroundings. In the face of such unsatisfactory examinations it is to say the least remarkable that the Master should accept their opinions over those of men of at least equal intelligence who have given the subject special attention and thorough examination.

We will only notice in passing the profile of the road

made by engineer Williams, it shows the levels as taken 15 ft. each way from the track i. e. at stations 15 ft apart, and filled in between by the engineer to suit his imagination, at his office. The evidence shows the approach inclines are only from 4 ft. to 7 ft. in width and no station being taken upon them the steepness of the descent is not shown. The profile, therefore, is of no value as evidence.

The question may well be asked whether the omission to take levels on the approaches themselves was not intentional and designed to deceive.

The notices to the company by Township Supervisor Hold, as well as the law upon that subject, has been sufficiently considered above.

The Master dwelt strenuously upon the condition in which he found the crossing at the time of the hearing in the winter of 1888, some months after the accident.

While the crossing was not perfect even at that time, the evidence shows that it stands to reason it was not in the same condition as it was in the prior October. The coarse stone ballast was there upon the railroad *upon either side* where it appears in the photographs showing what the character of the stones was in in the road at the time of the accident, but they had been picked up and removed from the wagon track or had sunk into the earth, and wagons coming over continually had carried, doubtless (as testified) much dirt to be shaken off when jolting over the track and stones, covering up the stones and making a smoother track. But even as it appeared then and as shown in the photographs, we submit whether a "fair average crossing" or not, it is not what the public safety and convenience demand. As stated in authorities cited, it is not in as passable condition by any means as it "might easily be put in." "It is not in as passable condition as is consistent with the use of the highway by the railroad." It is not constructed with "the least possible inconvenience

to the public." It is not by any means "in as safe condition as the highway was before the railroad was built" or even, as shown by the evidence, in as safe condition as when the Receiver first took charge of the road, he having raised the track in ballasting it, without filling in the approaches. Record p. 33.

9TH AND 10TH GROUNDS—THE REPORT IS BASED UPON INCOMPETENT EVIDENCE.

The ninth and tenth grounds of exception to the Report will be considered together although the one is directed to the objectionable testimony itself, and the other is directed toward the consideration and findings upon it by the Master. The Master as is apparent upon the face of the report, received, considered and based his finding upon incompetent testimony viz.: upon testimony as to the general traffic over the crossing, rather than the testimony relating to the event complained of. And upon the testimony as to the condition (comparative) of other crossings in that section of the country. The legal objections to all this testimony is above elaborated and will not further be dwelt upon, except to say, that the record shows the especial attention of the Master and the Court below was called to the objectionable nature of this evidence.

11TH GROUND—THE SO CALLED EXPERT TESTIMONY.

The defense sought to be made by appellee as disclosed by the Record consisted almost entirely of so called *expert testimony*, or testimony of the opinion of witnesses as to whether this was a dangerous crossing and how it compared with other railroad crossings. No attempt was made to lay any foundation for such testimony, even if it had been competent. No testimony was adduced to show that the witnesses were either capable of forming any opinion or had made the necessary investigation to be able to express any reliable opinion. In fact it appeared in almost every case upon cross-examination that the witnesses were in no way qualified to give any opin-

ion, but as friends of the railroad people merely came in and volunteered an expression of their sentiments after a casual passage over the crossing. Nor was the appellant even given the opportunity to know what other railroad crossings the Avenue crossing was being compared with, so as to go into all the surroundings of each particular case. The taking of this testimony fairly justified a trial of all these collateral things.

If this kind of testimony is to decide this case the appellant could have brought in hundreds of witnesses, farmers etc., from Wood County to have sworn that it was not a good crossing, not an average crossing, etc., *but was one notoriorsly bad so much so that numerous complaints were made to the township supervisor and his action invoked to secure its being placed in proper and safe condition.*

We submit that all such testimony (even if proper foundation was laid) was incompetent, irrelevant, and as the results show, grossly prejudicial.

12TH GROUND—INCONSISTENCY IN THE REPORT.

The Report is inconsistent upon its face. The Master in the early part of the Report finds in stating the facts that the wood was safely and properly loaded, (that the ballast covered the highway a few feet on each side of the track) that the horses were quiet, and that the young man was a careful and experienced driver. *No finding of contributory negligence in any respect appears.* And yet after finding the ballast was upon the crossing incline he determines the crossing was reasonably safe for the traffic passing over it and was not the cause of the accident.

The accident was certainly chargeable to some cause, if it was not the horses, or the way the wood was loaded, or the action of the young man that caused it; it must certainly have been the condition of the crossing, especially so when it is proven that the accident occurred in the manner it did, and it is stated by two eye witnesses (Mr. and Mrs. Lauman. Record pp. 23, 25, 26, 27, 28, 31,

122) that the wheels of the wagon struck the large stones in the wagon track; just at the time the wagon was on the incline and the wood was pitched forward.

The Master, however finds the contrary to be true, viz: that the crossing did not cause or contribute to the injury. It must perforce of common reason, been chargeable then to either the horses, the way the wood was loaded or the young man himself, but which he finds was not so. It is therefore manifest that the findings of the Master are inconsistent, the facts as found by him cannot in the ordinary coarse of nature all exist cotemporaneously. The real truth about the matter plainly is, that the Master after finding no negligence is chargeable to the case of appellant, by a sort of *extra judicial inference* determines that there must be some contributory negligence in some manner, but in what manner fails to state. Nor is that all, this remarkable inference is argued from and based upon his own wrongful action in examining other crossings, and the rotten testimony that this crossing "*averaged*" up with others crossings, and "*other traffic*" had passed safely over it.

The entire report seems to counsel so absolutely unsupported, so inconsistent and so unprecedented, that he will not longer consume time and space in criticising it.

THE RELIEF SOUGHT.

Petitioners allowed to intervene in equity cases may except to the Masters Report and appeal to this court.

Ex parte Jordan 94 U. S. 248.

Savannah *vs.* Jessup, 106 U. S. 563.

Hovey *vs.* McDonald, 109 U. S. 150.

The appeal brings the whole case before this Court, and it is "bound to decide the case so far as it is in a condition to be decided."

Riding *vs.* Johnson, 128 U. S. 212.

Central Trust Co. *vs.* Seasongood, 130 U. S. 482.

Moore *vs.* Huntington, 17 Wall 417.

Cohens *vs.* Virginia, 6 Wheat. 264.

Wiscart *vs.* Dauchy, 3 Dall. 321, 327.

And the Court will examine the whole evidence and consider the weight of the testimony.

Metsker *vs.* Bonebrake, 108 U. S. 66.

Blease *vs.* Garlington, 92 U. S. 1.

It is certainly very desirable to have the whole case finally determined and allow appellant the benefit of any judgment to which he is entitled, without another long delay and a possible necessity of another appeal to this Court.

AMOUNT OF DAMAGES.

The statutes of Ohio under which this action is maintained by the personal represnetative of the deceased, are found in the Revised Statutes, Secs. 6134 and 6135, which read as follows:

SECTION 6134. "Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect or default is such as would (if death had not ensued,) have entitled the party injured to maintain an action and recover damages in respect thereof; then, and in every such case, the person who, or the corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances, as amount in law to murder in the first or second degree, or manslaughter."

SECTION 6135. "Every such action shall be for the exclusive benefit of the wife, or husband, and children, or if there be neither of them, then of the parents and next of kin of the person whose death shall be so caused; and it shall be brought in the name of the personal representative of the deceased person; and in every action the jury may give such damages, not exceeding in any case ten thousand dollars as they may think proportioned to the pecuniary injury resulting from such death, to the persons respectively for whose benefits such action shall be brought. Every such action shall be commenced within two years after the death of such deceased person. Such personal representative, if he was appoint-

ed in this state, with the consent of the court in making such appointment may at any time before or after the commencement of a suit settle with defendant the amount to be paid, and the amount received by such personal representative, whether by settlement or otherwise, shall be apportioned among the beneficiaries, unless adjusted between themselves, by the court making the appointment in such a manner as shall be fair and equitable, having reference to the age and condition of such beneficiaries and the laws of decent and distribution of personal estates, left by persons dying intestate."

The word "pecuniary" as used in the Statute is not to be construed in a strict sense. The damages are largely prospective and may include whatever the parents and brothers and sisters had a reasonable expectancy of receiving from the deceased.

3 Sunderland on Dam. 283 and cases cited.

Penna. R. R. Co. *vs.* Keller, 67 Pa. St. 300.

The possibility of the next of kin inheriting future acquisitions from the deceased, should be considered in awarding damages.

Hall's Admr. *vs.* Crain, 3 W. L. M. (Ohio) 137.

In general, may consider what the next of kin might have reasonably expected from the deceased had he lived.

Grotenkemper *vs.* Harris, Admr., 25 Ohio St. 510.

Collins *vs.* Davidson, 19 Fed., Rep, 83.

And in ascertaining probable duration of life and accumulations, *mortuary tables* may be put in evidence.

3 Sunderland on Dam. 283.

Denver, etc. R. R. Co. *vs.* Woodward, 4 Colo. 1.

Sauter *vs.* New York Cent. R. R. Co., 66 N. Y. 50.

David *vs.* Southwestern R. R. Co., 41 Ga. 223.

As to amount of damages awarded in similar cases under a statute providing for the pecuniary damages to *next of kin alone* and limiting the maximum amount to $5.000.

See Ewen *vs.* Chicago, etc. R. R. Co., 38 Wis. 613,

where $2,500 was awarded *parents* for the loss of a little boy nine years old. No earning capacity shown.

Potter *vs.* Chicago, etc. R. R. Co., 21 Wis. 372, where $3,000 was awarded *parents* for the wrongful death of a little girl twelve years old. No earning capacity shown except that "she helped her mother."

In Terry *vs.* Jewett 17 Hun. 395, $4,000 was allowed a *father* for the death of a young woman.

In Penna. R. R. Co. *vs.* Keller, 67 Pa. St. 300, $3,000 damages were given a *mother* for the death of a young man with only one leg. No earning capacity shown.

In North Penna. R. R. Co. *vs.* Kirk, 90 Pa. St. 15, $3,050 allowed *parents* for the death of a young man who did not earn nearly so much as in case at bar.

In Louisville etc. R. R. *vs.* Connor 9 Heisk (Tenn.) 20, $3,000 was allowed a *mother* for the death of an infant child 18 months old.

In the late case of Missouri Pacific Ry. Co. *vs.* Lee 70 Tex. 496, 503, a *mother* was allowed $5,000 for the death of her son who was a farm hand. The court saying, "The idea given in the testimony of this boy's character, habits and person is that of a prospective useful and prosperous citizen from whom the mother, but for his taking off, would have received assistance greater probably then has been given her."

In Hunt *vs.* Missouri R. R. Co. 14 Mo. App. 160, $5,000 was awarded a *wife* for the death of her husband.

These cases were under statutes providing for *next of kin alone* and where the maximum amount of recovery allowed was $5,000.

Under the Ohio Statute in the absence of any wife or children, damages are recoverable by the administrator for the "*parents and next of kin*" and the maximum amount of damage is fixed at $10,000.

William Furrer having no wife or children surviving him, (Record p. 78,) the measure of damage is the pecuniary damage suffered by the parents, Joseph and

Annette Furrer, together with that sustained by that of his brothers and sisters("next of kin") viz., Joseph Furrer age 17 years, Mary Furrer age 19 years and Martin Furrer age 10 years. Record pp. 77.

To ascertain the amount of damage, should take into consideration the decedent's health, age, habits of industry, sobriety, personal characteristics, mental and physical capacity to render services and probable length of life.

Baltimore etc. R. R. Co. *vs.* Kelley 24 Md. 271.

5 Amer & Eng. Ency Law 45.

2 Thompson on Neg. pp. 1290, quoting case of—

Rose *vs.* Des Moines Valley R.R., 39 Iowa 255 in which $5,000 was awarded for the wrongful death of an unmarried man 24 years old, who was of temperate and industrious habits and whose net earnings at the time of his disease was only $263 per annum.

This case is quite similar to the case at bar except in the earning capacity of the deceased, which is here much greater.

The amount of damages to be allowed parents is not restricted to the value of services of the child during minority but may recover for what pecuniary benefits they have reasonable expectancy of receiving after minority.

North Penna. R. R. Co. *vs.* Kirk, 90 Pa. St. 15.

Terry *vs.* Jewett, 17 Hun. 395.

Potter *vs.* Chicago, etc. R. R. Co. 22 Wis. 615.

3 Sunderland on Dam. 283.

In the case of Sioux City & Pacific R. R. Co. *vs.* Stout 17 Wall. 657 the U. S. Sup. Court allowed a verdict of $7,500 for loss of a foot to go unchallenged.

In the case of Potter, Recv'r *vs.* Bunnell, 20 Ohio St. 150, $6,000 damages were awarded for mere injuries received.

In the case of Illinois Central R. R. Co. *vs.* Barrow, 4 Wall. 90, where a judgment for $3,750 for a death from personal injuries was affirmed, it was held that in this

kind of an action it is not necessary to show that the next to kin etc. had a legal claim upon the deceased for support.

The undisputed evidence shows William Furrer was a man of exemplary habits, strong, healthy, intelligent and industrious. Record pp. 60 to 76 inclusive.

The deceased was the main stay and support of the entire family, the mother being sickly, Record p. 75, and the father having an artificial leg, and being deceased from the war. Record pp. 70, 73, 74, 75, 76 and 78.

Witnesses who know him well and what he could earn agree he cannot be replaced upon his father's farm, by a man to take full control and do the work there that William did, by paying less than $2.00 per day. Record pp. 60, 63, 65, 75, 78, (say $600 per year.)

Besides this he earned considerable money by playing the violin and buying and selling wood, laboring with his father, teams, etc. His expectancy for life was according to mortality tables 40 years, Record pp. 68. It would be safe to say he could accumulate each year over and above his living expenses $300.00. In 40 years, say nothing of the accumulations upon the money saved, he would be worth $12,000, which his next of kin would have reasonable expectation of inheriting. The cases cited as to amount of damages given in similar cases are those in which the damages to parents alone were considered. Calling the damages to the father and mother of William Furrer by reason of his death $4,000, which is a low estimate of his pecuniary worth to them in supporting them in their aged, sickly and crippled condition.

See Johnson *vs.* Chicago, etc. R. R. Co. 64 Mo. 425.

$6,000 would be a low valuation of his pecuniary value to the two brothers and one sister; aside from the expectancy of what they might inherit from him, they were dependent upon him not only for support, but as the evidence shows for their education.

Stoher *vs.* St. Louis, etc. R. R. Co., 91 Mo. 511.

Tilly *vs.* New York, etc. R. R. Co., 24 N. Y. 471.
McIntyre *vs.* N. Y., etc. R. R. Co., 37 N. Y. 287.
Atchinson *vs.* Twine, 9 Kan. 350.

Already two of them have been withdrawn from school, Joseph entirely and Mary partially. Record pp. 65. 75.

Who can limit the damage of the loss of an education to a child? Had William Furrer lived and his brothers and sisters received good educations there is no limit to what the future might hold in store for them: as it is now they can never hope to rise above the life of a daily laborer since the education that would aid them so to do is denied them.

In any view of the case it is apparent that $10,000 is only a reasonable compensation to this family for the death of their son and brother, five per cent. upon that would only amount to what he could earn and contribute to their support, Record p. 60, and his expectancy of life was such that he might easily have accumulated that amount to leave at his death.

Feeling confident that the rights of the intervening petition will be carefully considered, and that a judgement will be given in favor of an amount of damages such as appellant is entitled to under the testimony, the case is respectfully submitted.

ORVILLE S. BRUMBACK,
*Attorney for Appellant.*

Office Supreme Court U. S.
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JAMES H. McKENNEY,
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IN

# THE SUPREME COURT OF THE UNITED STATES.

JOSEPH FURRER,
Administrator of the Estate of William Furrer, Deceased,

*Appellant,*

—*vs.*—

JAMES M. FERRIS,
Receiver of The Toledo, Columbus and Southern Railway Co.

*Appellee.*

# BRIEF OF APPELLEE.

**A. W. SCOTT,**
*Counsel for Appellee.*

BARKDULL PRINTING HOUSE, TOLEDO, O.

# IN THE SUPREME COURT OF THE UNITED STATES.

JOSEPH FURRER,
*Administrator of the Estate of William Furrer, Deceased,*
*Appellant.*

—*vs.*—

JAMES M. FERRIS,
*Receiver of The Toledo, Columbus and Southern Railway Co.*
*Appellee.*

## BRIEF OF APPELLEE.

The "Statement of the Case" by counsel for appellant in his brief is not objectionable.

The "Preliminary" is a recapitulation of evils incident to the operation of railroads by receivers, with references to watered stocks and excessive bonded indebtedness in railroad manipulation, the pertinency of which is not disclosed by the record. We also find the dissenting opinion of late Justice Miller, in Barton vs. Barbour, Receiver, 104 U. S. 126, largely quoted from, but without reference to the case at bar. In this dissenting opinion, the eminent jurist argues only against the rule, approved by a majority of the court, "that a receiver cannot be sued without the leave of the court

by which he was appointed," but had his views been the opinion of the entire court, we are unable to see how it could have been applied to the case at bar, as the question involved in that dissenting opinion never arose, and could not have arisen in this case from the facts as shown upon the record.

This action was commenced after the act of March 3, 1887, U. S. Statutes at large, vol. 24, page 554, which annuls the rule complained of, and provides for suits against receivers without the leave of the courts appointing them, and when appellant commenced his proceeding, he had a right to an action at law, with all the benefits of a jury, had he chosen to exercise it. On the contrary, he preferred to submit the matter to a court of equity, and sought and obtained leave of the court to intervene in the court and cause in which the receiver had been appointed. See Journal entry. (Record, page 1.) And prior to the act of March 3, the appellant had a right to his action at law, and a trial by jury, if the leave of the court appointing the receiver was first obtained; yet appellant made no effort to get the leave of the court for such purpose, but voluntarily, and of his own motion, begged the jurisdiction of the court where his claim was finally adjudicated, and what is said by counsel for the appellant in the "Preliminary" is not pertinent to the case at bar. Appellant, by his counsel, knew that when he came into a court of equity, his cause would be tried without the intervention of a jury, and would in all probability be referred to a Master; and when this was afterwards done, it was with his acquiescence, and without his objection.

We come now to the "Argument" of appellent, commencing on page 5 of his brief.

The Master to whom this case was referred is A. J. Ricks, now judge of the United States District Court for the Northern District of Ohio, and the complaint is made, that Judge Ricks, when he went to view the crossing complained of in the petition, also went to see other crossings of a like kind in the immediate neighborhood. Counsel for appellant say that the Master went to see the crossing in question with their consent, but that the view of other crossings was surreptitious, and without their consent, and this view of other crossings by Judge Ricks, in some way rendered his findings of fact erroneous. The Master in his report (record, page 6), seems to say that he viewed the crossing in question, and the other crossings, with the consent of counsel, but perhaps on close examination, and taking into account the affidavit of counsel for appellant, the language of the Master might be construed to mean that he inspected the crossing *in question* with consent of counsel, and for his own satisfaction, and also inspected other crossings, without intending to say that this inspection of other crossings was with consent of counsel; at all events we do not think it probable that Judge Ricks intended to mistake the facts in reference to this important matter, as might be inferred from the earnestness of appellant's counsel, and we cannot conceive how the fact that the Master had seen other crossings of the kind in question, in the same locality, can have disqualified him from forming a correct judgment as to the negligence of the Receiver in the construction of the crossing in question.

By reference to the Master's report, page 5 of the record, it will be seen that the Master found from the inspection of the crossing in question, "that said cross-

ing was not a dangerous one, and was in passable condition." To do this he did not resort to the comparison made with other crossings, for he says immdiately following the quotation just made, "If it is proper and competent to compare it with other highway crossings on the same road and through the same section of the country, it can be fairly said to be a good average road crossing," showing that the Master had some doubt as to whether he should resort to comparison to determine if this was an average crossing, and showing that he did not resort to comparison in determining that the crossing in question was not a dangerous one, and was in passable condition.

We think the Master was over cautious in this respect, and have no doubt that he had a perfect right to examine railroad crossings of a like kind wherever he could find them ; to note their construction, and examine appliances adopted to secure the safe passage of vehicles and pedestrians, and to compare these crossings, their construction and appliances, with the crossing in question, and determine by this comparison, and other evidence, if the Receiver was guilty of such negligence in the construction of this crossing as to make him liable to appellant in the premises.

The sole cause of action as stated by the appellant in his petition is the carelessness of the Receiver in the construction of this crossing, and the duty of the Master was to determine if the Receiver was guilty of such carelessness as to make him liable. The Receiver was not under obligation to construct a crossing on which no accident could occur ; he did not become the insurer of the person and property of all who might use it, but his obligations were to use ordinary care, "such care

which persons of ordinary care and prudence are accustomed to use and employ, under the same or similar circumstances, in order to conduct the enterprise in which they are engaged to a safe and successful termination."

*C. C. & C. Ry. Co. vs. Terry, 8 O. S. 581.*
*Gill vs. Ry. Co., 27 O. S. 250.*
*C. C. & C. Ry. Co. vs. Crawford, Admr., 24 O. S. 631.*

To determine whether such ordinary care had been used by the Receiver, it was proper for the Master to find out what persons of ordinary care and prudence are accustomed to do under the same or similar circumstances; and that could not better be done than by examining other crossings of a like nature in the same locality, and by becoming familiar with the manner in which such crossings are usually constructed. When the Master had become familiar with the manner in which such crossings are usually constructed, he could then more readily determine if in this particular case ordinary care had been used.

For a like reason the Master had a right to hear the testimony of others who were familiar with the crossing in question, and other crossings of a like kind in the same neighborhood, and find from their knowledge acquired by comparison if this crossing was constructed with reference to safety as such crossings are usually constructed under like circumstances; rightly presuming that if it was, the Receiver had then exercised ordinary care in its construction, and was not guilty of such negligence as would render him liable to the plaintiff under the circumstances of this case.

In connection with this matter it might be well to call the attention of the Court to the fact that at the

time of the view by the Master the crossing was in the same condition that it was at the time of the accident; this fact seems to be admitted by both parties, and is testified to by witnesses on both sides. John W. Cribs and Henry E. Mandel on the part of the plaintiff, pages 35 and 47, respectively, of the record, and W. H. Harring, Road Master, on the part of the defendant, page 89 of the record; so that when the Master saw the crossing and compared it with other structures of a like kind, he saw it as it was when the accident occurred.

The testimony all shows that the wagon road at this point was about level, that the railroad track was raised about one foot above the level of the wagon road, and that the approach on each side of the track was about seven feet in length, making an incline of one foot in seven. See the testimony of plaintiff's witnesses, John W. Cribs, page 34, Henry E. Mandel, pages 44 and 47 of the record, also the testimony of Malcolm E. Williams, the Engineer who made the measurements and drew the profile (Exhibit E.), pages 80 and 81 of the record. Yet the only negligence complained of was that the descent from the railroad track was too abrupt, and that among the broken stone used for ballast by the Railroad Company, some pieces of stone were too large. Of the large number of witnesses who testified on behalf of the Receiver, all unite in saying that the crossing was to all appearances a safe one; that as compared with other crossings there was nothing remarkable, except that two or three witnesses say that this was better than the average crossing; all of them unite in saying, nothing in the size of the stones, or grade of the slope, would indicate danger.

But we do not think this Court is going to try this

case over, as it was tried before the Master, and again tried before the Circuit Court on the exceptions to the report, and will not examine and weigh the evidence in order to see if it will support the facts as found by the Master. We think from the ruling of this Court in other cases that the most that this Court can do in the premises is to determine whether the facts as found by the Master support the judgment of the Circuit Court.

Among other things the Master found the following facts:

1. That the crossing was not a dangerous one and was in a passable condition. (See page 6 of the record.)

2. The track had been ballasted and some of the ballasting was on the highway, but the stones were broken to a fair size. (Page 7 of the record.)

3. The crossing, as established and maintained, was reasonably safe for the traffic passing over it, and was not at the time of the injury in such an unsafe and dangerous condition as to have caused the injury complained of, and the Receiver was not guilty of negligence in maintaining the said crossing, and is not liable for the injuries sustained. (Page 7 of the record.)

These facts as found by the Master certainly sustain the judgment of the Court below, and the only question is whether this Court, under its former holdings, will go farther and determine if the findings of fact are warranted by the testimony.

We have before called the attention of the Court to the fact that this is in truth an action at law, in which the parties were entitled to trial by jury, without the leave of the court appointing the Receiver. The appel-

sive as to all the facts contained in it. This is the opinion of the Court, but not unanimously."

As to the second proposition, Justice Wilson wrote a dissenting opinion.

In Pomeroy et al. vs. Bank of Indiana, 1 Wall. 592, the Court say:

"There is no mode to review or re-examine the rulings of the court below in admitting or rejecting evidence, except that of the bill of exceptions."

In conclusion we claim that this action is in all respects an action at law, in which either party could have insisted upon the right of trial by jury; that this right was waived by both parties, and by consent it was submitted to a Referee; that there was no stipulation in writing filed with the Clerk waiving a jury, as provided for in section 649, Revised Statutes, and that the fact, that by leave of the court the appellant was permitted to intervene with his action at law in a court of equity, does not change the nature of his action and make it a case of equity, and this Court will not review it on appeal, but only on the bill of exceptions presented in due form.

There are other matters mentioned and authorities cited by counsel for appellant in his brief, but not of such a nature, as we think, to call for further answer from us.

A. W. SCOTT,
*Counsel for Appellee.*

T45—15

# RECORD, CASE No. 13,446

## SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1895.

TERM No., 297.

W. H. BARNETT, PLAINTIFF IN ERROR,

*vs.*

THE CITY OF DENISON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

FILED DECEMBER 10, 1895.

# RECORD, CASE No. 13,440.

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1891.**

TERM No., 297.

W. H. BARNETT, PLAINTIFF IN ERROR,

*vs.*

THE CITY OF DENISON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

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1 Be it remembered that at a regular and stated term of the circuit court of the United States for the eastern district of Texas, begun and held at Tyler, Texas, in said district, on the second Monday, the 10th day, of May, A. D. 1886—present and presiding, the Honorable Chauncy B. Sabin, U. S. district judge—the following proceedings were had:

*Copy Original Amended Petition.*

In the Circuit Court of the United States for the Eastern District of Texas.

Hon. the judges of the said court:

The petition of W. H. Barrett, who is a resident citizen of the city and county of St. Louis, in the State of Missouri, complaining of The City of Denison, a corporation created by and under the laws of the State of Texas and being a resident citizen of the county of Grayson, in said State of Texas, shows to the court—

That on the — day of ——, —, the said City of Denison, hereinafter styled defendant, made, executed, and delivered to bearer its coupons due at the dates hereinafter given: 16 coupons for $25, twenty-five dollars, each, due January 1st, 1874.

2 16 coupons for $25, twenty-five dollars *dollars*, each, due July 1st, 1874.

16 coupons for $25, twenty-five dollars, each, due Jan'y 1st, 1875.
16 coupons for twenty-five dollars each, due July 1, 1875.
16 coupons for $25, twenty-five dollars, each, due Jan'y 1, 1876.
16 coupons for $25, twenty-five dollars, each, due July 1, 1876.
16 coupons for $25, twenty-five dollars, each, due Jan'y 1st, 1877.
16 coupons for $25, twenty-five dollars, each, due July 1st, 1877.
16 coupons for $25, twenty — dollars, each, due Jan'y 1, 1878.

That the said coupons were each and all made payable at the Importers' and Travellers' National bank, New York, N. Y.

That each and all the same constitute and obligation of the said city of Denison, and have been presented for payment at the time and place where the same were due and payable, but that, though often requested, the said defendant has failed and refused to pay the same or any part thereof.

3 That plaintiff is now the owner, holder, and bearer of each and all the said coupons; that he procured the same for a valuable consideration before the maturity of same.

That the plaintiff here and now comes and files this his substituted petition in lieu of one suing upon the same coupons filed in this court prior to the 17th day of November, 1878, and upon that day destroyed by fire; that plaintiff prays that this petition, which he alleges is a substantial copy of that destroyed, be taken, held, and read in all things in its place as a full substitute, and that he have judgment against the said defendant for the amount of the

said coupons, together with legal interest thereon from the dates they are severally due.

WHITAKER AND ROBINSON,
G. W. & H. CHILTON,
*Att'ys for Petitioner.*

*Agreement of Counsel.*

It is agreed that the foregoing petition is a substantial copy of the original and amended petition lost by fire, and that it be filed as a substitute therefor Dec'r 9th, 1879.

ROBERTSON AND HERNDON,
*Att'ys for Def't.*
WHITAKER AND ROBERTSON,
G. W. AND H. CHILTON,
*Att'ys for Pl'ff.*

4 Endorsed: No. 1555. W. H. Barnett *vs.* The City of Denison. Original and amended petition. Filed Dec'r 9th, 1879. W. M. Reed, clerk.

*Defendant's Answer and Demurrer.*

In the U. S. Circuit Court for the E. D. of Texas, at Tyler.

WM. H. BARNETT
*vs.*
CITY OF DENISON. } # 1555.

And now comes the said defendant, City, by att'y, and prays to substitute the plea of *non est factum* made and filed by the mayor of said def't, City, on the 2nd day of May, 1876, to wit, the substance of which said plea was as follows:

And now comes said def't, City, in said cause, by its mayor, R. M. Grubbs, and upon oath says that the said coupons or writings obligatory described in pl'ff's petition and the bonds from which they were severed were never in truth and fact made, executed, and delivered by the said city of Denison or its authorities; that the same and each of them described as aforesaid is not the act or deed made or executed by said city of Denison or any person whomsoever authorized to make and execute the same; all of which he is ready to verify.

5

(Signed) R. M. GRUBBS,
*Mayor of the City of Denison.*

*Def't's Exceptions to Pl'ff's Petition.*

In U. S. C. Court for E. D. of Texas, at Tyler, Texas.

W. H. BARNETT
*vs.*
CITY OF DENISON. } #1555.

And now comes said def't, City, by att'y, and excepts to the pl'ff's petition because the same is insufficient in law and prays judgment.

And said def't, City, comes, by att'y, and denies all and singular the allegations in plaintiff's petition and demands proof.

And said def't, *Co.*, comes, by att'y, and says that said pl'ff ought not to recover in this cause, because it says that the obligations described in pl'ff's petition are not legal and genuine writings obligatory against this def't, and said pl'ff took the same having full knowledge of the fact that said obligations were never in
6 fact and truth made, executed, and delivered to p'ff or to any other person or corporation and in fact were never executed by said def't or its authority; all of which this def't is ready to verify.

Def't further avers that said city of Denison never issued or caused to be issued any such obligations as the coupons described in pl'ff's petition or the bonds from which they were severed.

That those described in pl'ff's petition were and still are a pretended bond gotten up by the said city with intent at the time the same were struck off and printed to be used by said city to pay a conditional contract with the Atlantick and Tex. Refrigerator Car Co. for 10,000 dollars, but which contract never matured, the conditions were never performed, the bonds were never demanded, and the bonds printed were not in proper form and substance and were in fact ordered to be canceled by the city council and were supposed and beleived to be cancelled until the institution of this suit.
7 That said bonds and coupons attached were fraudulently withheld from cancellation by some one unknown to def't and delivered to said pl'ff, who then and there had full knowledge of and participated in said fraud and who was interested in said car company and pretended to receive them upon said unmatured contract; all of which was fraudulent and done by said pl'ff with intent to cheat and defraud the said city of Denison out of said sum. Wherefore def'ts pray judgment that pl'ff take nothing by his suit and be taxed with the cost.

W. S. HERNDON &
SAWNIE ROBERTSON,
*Att'ys for Def't.*

The above is a substantial copy of the original answer filed in this suit by def't May 2, 1876, and which was destroyed by fire Nov'r 16th, 1878.

W. S. HERNDON AND
SAWNIE ROBERTSON,
*Att'ys for Def't.*
WHITAKER & ROBERTSON AND
G. W. AND H. CHILTON,
*Att'ys for Plaintiff.*

Endorsed: No. 1555. W. H. Barnett *vs.* City of Denison. Plea of *non est factum.* Demurrer & answer. Filed 2 May, 1876. W. C. Robards, clerk. Substituted copy. Filed Jan'y 9th, 1883. W. M. Reed, clerk.

8 *Def't's Plea of Failure of Consideration.*

W. H. BARNETT *vs.* CITY OF DENISON. } No. —. Pending in the U. S. Circuit Court, at Tyler, Texas.

And now comes the said defendant, City, by attorney, in the above cause, leave of the court being first had, and for amendment says that heretofore, to wit, on May 2nd, 1876, among other pleas filed in said cause by defendant was a plea of "failure of consideration," which was duly sworn to by R. M. Grubbs, the then mayor of the city of Denison, and which plea, with others then and there filed by defendant, were destroyed by fire on the 16th day of November, 1878, and afterwards, when the papers were substituted in said cause, January 9, 1882, the said plea of "failure of consideration" was omitted through mistake or some cause now unknown to affiant, but which said plea, in the opinion of the attorneys of defendant, is necessary and proper and was so considered at the time the same was filed; and the said defendant, by attorney, now substitutes a copy of said plea of "failure of consideration" filed as aforesaid May 2, 1876, to wit:

And now comes the said defendant, City, in said cause, by its mayor, R. M. Grubbs, and upon oath says that if said plaintiff was in fact the owner of the obligations in writing described in his said
9 petition at the date of filing his said suit that he became such owner after the maturity of the said obligations in writing, and had and took notice of all defenses and equities against the same.

And affiant further says that the said obligations sued on, as well as the pretended bonds from which the coupons were severed, were never in fact made and delivered by defendant as negotiable paper or in pursuance and execution of any contract; that a certain contract was made on the — day of ——, 1873, by the Texas and Atlantic Refrigerator Car Company, a private corporation created by the laws of the State of Missouri, and the city of Denison, based upon a proposition of said corporation to said defendant as follows, to wit:

"*Proposition of the Texas and Atlantic Refrigerator Car Co.*

In consideration of the issuance by the city of Denison of $10,000 worth of bonds the above company, by its agent, F. A. Hyatt, makes the following proposition of contract:

1st. To erect at Denison slaughter-houses, tanks, machinery, and other material of the value of $15,000.

2nd. That the buildings are to be of a permanent nature and to remain at Denison.

3rd. The bonds to be handed over to the company when
10 a committee appointed by the city council shall have determined that the terms of the above contract have been fully carried out.

T. & A. R. C. COMPANY,
Per F. A. HYATT."

A writing coupled with said proposition, further explaining the benefits thereof, was also submitted to defendant, City, with it, and the said defendant considered the said proposition and agreed to it, and on the 9th day of August, 1873, by an ordinance authorized the issue of bonds and otherwise prepared to meet said contract, but the bonds were prepared in violation of the charter of the city and the law, not having the object for which the same were issued specified in the face of bonds, and were afterwards ordered by the city council to be cancelled and the same were cancelled by burning under said order, so far as bonds printed were known to exist, and were not in fact delivered to said corporation or any one for it by said defendant or its authority.

Because affiant says there was and is a total failure of consideration on the part of said Texas and Atlantic Refrigerator Car Company, in this: that the said car company failed to erect buildings and appliances of a permanent nature in the city of Denison of the value of $15,000, and failed to operate said company by
11 dressing beef and shipping it to the markets of the East, and failed to comply with the terms of said contract in the shipment of beef. The permanency of the institution, in fact, became bankrupt soon after the first efforts to perform the work and ceased altogether to exist, and has not since and does not now exist as an institution.

Wherefore defendant says that it received no benefits under said contract as stipulated, and there was and is a total failure of consideration to said defendant under said contract; and if said plaintiff became the owner of any bonds or obligations as described in his petition the same were secured under and by reason of said contract, which was well known to said plaintiff before the same were, in fact, prepared by defendant to meet said contract and by all persons who had or held said obligations, and all such persons took notice of the defects therein and the defenses thereto.

R. M. GRUBBS,
*Mayor of City of Denison.*

Subscribed and sworn to before me May 2nd, 1876.
W. C. ROBARDS,
*Clerk U. S. Circuit Court.*

W. S. Herndon, one of the attorneys of the defendant, City, in the above-entitled cause, says that the above and foregoing plea
12 of failure of consideration is substantially true as made and filed in said cause May 2, 1876, and that, as he now remembers, he in person prepared said plea, had it sworn to and filed, and if substituted heretofore was mislaid or has been lost.
W. S. HERNDON.

Subscribed and sworn before me this May 10th, 1886.
W. M. REED, *Clerk.*

Endorsed: No. —. W. H. Barnett *vs.* City of Denison. Plea of failure of consideration. Filed May 10th, 1886. W. M. Reed, clerk.

*Pl'ff's Bill of Exceptions.*

Be it remembered that on the trial of the above-entitled cause the following facts were shown:

The following provisions of the charter of the city of Denison were offered:

SEC. 27. To borrow money on the credit of the city, and issue bonds therefor, to an amount not to exceed fifty thousand dollars. To make a loan exceeding fifty thousand dollars, the question must be submitted to the qualified voters of the city, and if sustained by a majority of the votes polled, such loan shall be lawful. All bonds shall specify for what purpose they were issued, and not be
13 invalid if sold for less than their par value. And when any bonds are issued by the city, a fund shall be provided to pay the interest and two per cent. per annum on the principal, as a sinking fund, to redeem the bonds, which fund shall not be diverted or drawn for any other purpose. And, for the purpose of creating and keeping said sinking fund, to levy a special tax, over and above the general tax allowed by law; and also to levy a special tax to pay and discharge the amount due on said bonds over and above the amount of the sinking fund on hand at the maturity of said bonds: Provided, however, that no bonds shall be issued for any purpose whatever, bearing a greater rate of interest than ten per cent. per annum. The sinking fund for the redemption of any loan or debt shall be invested, as rapidly as the same accumulates, in interest-bearing bonds of the United States, the State of Texas, or in city bonds; and the interest of such bonds to be reinvested; and such bonds may be sold as rapidly, and in such sums as may be necessary to pay off any of the debts secured by said sinking fund.

SECTION 28. To issue bonds in aid of any corporation or enterprise, either manufacturing, railroad or for other purposes, calculated to advance the interests of the said city, and to borrow

14 money for that purpose, and to take stock therein, or in any of them: Provided, however, that in all cases arising under this section, a proposition of the proposed enterprise and the amount of aid asked, together with the proposed agreement on the part of the applicant, to be signed and delivered, shall be published in the body of a proclamation issued by the mayor, calling an election to pass upon the voting of such aid. Such publication shall be made in the official paper of said city at least three weeks previous to the election; and no such aid shall be granted, or bonds issued, unless a majority of the qualified voters at such election shall vote in favor of the issuance of said bonds. In case of such affirmative vote, then the bonds voted shall be issued by the mayor and council, as hereinafter provided for.

SEC. 156. That this act shall take effect and be in force from and after its passage.

Approved March 7th, 1873.

An ordinance authorizing the issuance of city bonds to the amount of twenty thousand dollars for the reduction of and cancellation of the outstanding city scrip and for the improvement of streets, &c.

SEC. I. Be it ordained by the city council of the city of
15 Denison, That there shall be issued by the city of Denison, bonds to the extent of twenty thousand dollars, and shall be known as "Denison City bonds." Said bonds shall mature in ten years from the date of their issuance and such bonds, or the proceeds thereof, shall be used for the purpose of redeeming the outstanding city scrip or other indebtedness and the improvement of the streets, as may be directed by city council, and said bonds shall bear an annual interest of ten per centum, payable semi-annually, expressed by coupons thereto attached, and shall be payable at the office of the Importers' and Traders' National Bank of New York City.

SECTION II. That the mayor and finance committee shall provide for the negotiation, sale, and placing of the bonds herein authorized.

SEC. III. That the bonds herein authorized shall be to blank or bearer and the same shall be signed by the mayor, countersigned by the city treasurer and attested by and recorded in a book kept by city clerk, in a book kept for that purpose.

SEC. IV. That the city treasurer shall make an annual reservation out of the general fund of an amount sufficiently to defray the interest annually, and an addition of not less than two per cent. per annum on the principal as a sinking fund to redeem said
16 bonds, which fund shall not be issued or drawn for any other purpose but for the payment and discharge of such bonds at maturity, and the same is hereby appropriated for such purposes, and so ordered and designated therefor.

SEC. V. That whenever any bond or bonds herein provided for shall have — signed and countersigned as herein provided, that they

may be delivered by the mayor to the party unto whom they may be disposed, who shall therefore make report to the treasurer of the names of the persons unto whom they are so disposed, together with the rates of disposition.

SEC. VI. That the city council reserve to themselves and their successors in office the right of paying these bonds, with the interest thereon, at any time after expiration of five years from the date of issuance of the same.

SEC. VII. That this ordinance shall take effect and be in force from and after its passage.

Passed August 9th, 1873.

FRANK SCHRADER, *Mayor.*

H. M. HANNAN, *City Clerk.*

Also that the bonds of which the coupons in controversy were a part were like the following:

17 EXHIBIT "A."

*Copy of City Bond.*

No. 2. COUNTY OF GRAYSON, *State of Texas.* $500.

*Denison City Bond.*

The mayor, aldermen and citizens of the city of Denison hereby acknowledge themselves indebted to —— —— or bearer, in the sum of five hundred dollars, which said sum they bind themselves and their successors in office to pay to the said —— —— or bearer, on or before the first day of July, 1883, at the Importers' and Traders' National bank, in the city of New York, and interest thereon from the first day of July, 1873, at the rate of ten per centum per annum, payable half-yearly on the first days of January and July of each year on presentation of the proper coupons hereto annexed, reserving to themselves and their successors in office, the right of paying this bond, with the interest thereon at any time after the expiration of five years, from the date hereof.

These bonds are issued by virtue of an ordinance passed by the board of aldermen of the said city, on the 9th day of August, and approved by the mayor on the 9th day of August, 1873.

18 In testimony whereof the mayor and board of aldermen have caused the seal of the said city of Denison to be hereto affixed and to be signed by the mayor, and countersigned by the city treasurer and attested by the city clerk, this 9th day August, 1873.

Five hundred dollars. 500

[SEAL.] FRANK SCHRADER, *Mayor.*

Attest: H. M. HANNAN, *City Clerk.*

Countersigned.
EDWARD PERRY,
*City Treasurer.*

Endorsed: Filed Febr'y 19th, 1886. W. M. Reed, clerk.

19 It is agreed that the plaintiff, W. H. Barnett, was entitled to recover on the coupons described in plaintiff's amended petition, filed December 9, 1879, to wit, 144 coupons of $25 each, falling due, 16 on Jan'y 1, 1874, and 16 every six months thereafter up to Jan'y 1, 1878, inclusive, as an innocent purchaser for value before maturity, unless the fact that the bonds of which the coupons in suit formed a part failed to specify the purpose for which they were issued more particularly than therein contained defeated them.

The said bonds and coupons were issued under the ordinance dated Aug. 9, 1873, hereinbefore copied, and under the provisions of the city charter hereinbefore set out.

If the failure to state the purpose for which the bonds were issued more specially than is contained in said bonds was such a defect as deprived them of the quality of negotiable paper and visited all purchasers for value with notice, then the city of Denison had a good defense to the suit; but if not such a defect, then the plaintiff ought to recover as prayed for in his petition.

Under the above state of facts the court charged the jury as follows:

*Judge's Charge to the Jury.*

Charge to jury.

GENTLEMEN OF THE JURY: This is a suit to recover upon coupons belonging to 16 five-hundred-dollar bonds, there being 144
20 coupons of $25 each, due at different dates, as stated in the petition.

The defense is that the bonds were never made and issued by the defendant, and that no consideration was ever received for them; and it is also claimed that the bonds are defective for want of specifying the purpose for which they were issued.

The bonds purport to have been issued by virtue of an ordinance of August 9, 1873.

This allegation simply declar-s the authority under which the bonds were issued; but by reference to the ordinance it appears that such ordinance specifies the purpose for which they were to be issued, and that such purpose was for redeeming outstanding city scrip or other indebtedness and for the improvement of the streets.

The bonds themselves do not specify for what purpose they were issued, which renders them defective and subjects them to any defense which the city may have against them, thereby impairing their commercial value.

The charter, which is the source of their power for issuance, by one of its provisions declares that such charter shall be deemed a public act and shall be so regarded in all courts and places.

The section of the charter authorizing the issuance of the bonds provided for in the ordinance makes this requirement or provision, viz: "All bonds shall specify for what purpose they were
21 issued and not be invalid if sold for less than their face value."

The bonds are made payable to blank or bearer and were for a period of years and were purchased before maturity.

It was the plain object of the legislature that these bonds should specify upon their face or upon the paper upon which they were made the purpose for which they were issued. The bonds fail to disclose their purpose. They refer to an ordinance, not by way of disclosing their purpose, but by way of announcing by virtue of what authority they were issued. There are two ways by which this provision of the statute can be overcome or got around; one is to ignore it altogether, and the other is to construe it away by saying that the clause is simply directory or that the authority for issuance refer-ed to in the bond having contained the necessary declaration of purpose that might be regarded as a sufficient compliance *of* the statute.

But there is but one way by which force can be given to it, and that is to hold such bond defective, at least to the extent of subjecting it to any defenses which might exist between the original parties thereto; and the question is, What shall be done in this case?

22 The charter, or rather the act of the legislature creating the same, by its terms having declared itself a public act and providing that it may be used in evidence without proof and that judicial notice thereof shall be taken in all courts and places, necessarily affected all persons with notice of its requirements; in other words, notice was imputed to all persons purchasing bonds that the purpose for which they were issued should be stated therein; but if not so stated therein, what then? What is the court to say about it? Why, that question may be raised thereon. In this case questions of the making and lawful issuance of the bonds and of the failure of their consideration are presented, and, as it uncontradictioly appears that the defendant received no consideration for the bonds, you are directed to find a verdict for the defendant.

CHAUNCEY B. SABIN,
*U. S. District Judge for the Eastern District of Texas.*

May 15th, 1886.

Endorsed: No. 1555. W. H. Barnett *vs.* City of Denison. "We, the jury, find for the defendant. R. F. McFarland, foreman jury." Filed May 15th, 1886. W. M. Reed, clerk.

23 And, these being all the facts bearing on the issues here raised, the plaintiff then and there, before the retirement of the jury from the box, excepted to said charge of the court and the following part of same specially:

"The bonds themselves do not specify for what purpose they were issued, which renders them defective and subjects them to any defense which the city may have against them, thereby impairing their commercial value.

The charter, which is the source of their power for issuance, by one of its provisions declares that said charter shall be deemed a public act and shall be so regarded in all courts and places.

The section of the charter authorizing the issuance of the bonds provided for in the ordinance makes this requirement or provision, viz: 'All bonds shall specify for what purpose they were issued and shall not be invalid if sold for less than their par value.'

The bonds are made payable to blank or bearer and were for a period of years and were purchased before maturity. It was the particular object of the legislature that these bonds should specify upon their face or upon the paper upon which they were made the purpose for which they were issued. The bonds fail to disclose their purpose. They refer to an ordinance, not by way of disclos-
24 ing their purpose, but by way of announcing by virtue of what *what* authority they were issued.

There are two ways by which this provision of the statute can be overcome or got around. One is to ignore it al*l*together. The other is to construe it away by saying that the clause is simply directory or that the authority for issuance referred to in *in* the bond having contained the necessary declaration of purpose that might be regarded as a sufficient compliance *of* the statute. But — one way by which force can be given to it, and that is to hold such bond defective, at least to the extent of subjecting it to any defenses which might exist between the original parties thereto, and the question is, What shall be done in this case? The charter, or rather the act of the legislature creating the same, by its terms having declared itself a public act and providing that it may be read in evidence without proof and that judicial notice thereof shall be taken in courts and places, necessarily effected all persons with notice of its requirements. In other words, notice was imputed to all persons purchasing bonds that the purpose for which they were issued shall be stated therein; but if not so stated therein, what then? What is the court to say about it? Why, that questions may be raised thereon.

25 In this case questions of the making and lawful issuance of the bonds and of the failure of their consideration are presented, and as it uncontradictedly appears that the defendant received no consideration for the bonds, you are directed to find a verdict for the defendant."

Thereupon plaintiff, by his counsel, in open court, before the retirement of the jury from the bar, excepted to said charge, for the reason that said clause in the charter referred to by the court was directory merely, and that if not directory it was sufficiently complied with by stating the ordinance authorizing it, wherein the purpose is stated, and that the plaintiff, as a purchaser for value before maturity, should not be effected by a failure to state the purpose more directly, and that the true purpose, as shown by the ordinance, being a proper one, the failure to state the purpose was immaterial; and the court, notwithstanding the exception, gave the charge, and the jury returned the verdict for defendant.

Plaintiff tenders this bill of exceptions to the action of the court and asks that it be signed, sealed as such.

And the plaintiff also requested the court to give the following special charges, Nos. 1 to 4, inclusive:

26 In the U. S. Circuit Court, at Tyler.

W. H. BARNETT
*vs.*
CITY OF DENISON. } No. 1555. Special Charge No. 1.

The plaintiff asks the court to charge the jury that the evidence in this case shows that the city of Denison had a right to issue bonds, because its charter gave it that right. Therefore a purchaser of its bonds, if he is such purchaser without notice of any defect in said bonds, if any defect exists, and for a valuable consideration, has a right to presume that they were issued under such circumstances as gave the requisite authority, and such *bona fide* holder will be entitled to recover, although the bonds may have issued for a purpose and in a manner not authorized by law.

H. CHILTON,
H. M. WHITAKER,
*Att'ys for Pl'ff.*

Refused May 15th, 1886.

CHAUNCEY B. SABIN,
*U. S. Dist. Judge for the Eastern District of Texas.*

Filed May 15th, 1886.

W. M. REED, *Clerk.*

In U. S. Circuit Court for the Eastern District of Texas, at Tyler.

W. H. BARNETT
*vs.*
CITY OF DENISON. } No. 1555. Special Charge No. 2.

27 The plaintiff asks the court to charge the jury that the possession of the coupons sued on in this case raises the legal presumption that the holder is the owner, and that he obtained them before maturity for a valuable consideration and without notice of any defects in them, and the burden of proof is on the defendant to show the contrary; and if the evidence in this case shows that the plaintiff purchased the bonds and coupons from the Commercial Bank of St. Louis, the presumption arises that said bank obtained them for a value before maturity, without notice of any defects in them, and if the plaintiff purchased them from the bank, such purchase would entitle him to all the rights of the bank, and he would be entitled to recover the value of all the coupons, although some may have been due at the time of his purchase, unless the defendant shows that the bank is not an innocent purchaser for value before maturity without notice of any defects in the coupons.

H. CHILTON,
H. M. WHITAKER,
*Att'ys for Pl'ff.*

Refused May 15th, 1886.

C. B. SABIN,
*U. S. Dist. Judge for the Eastern District of Texas.*

Filed May 15th, 1886.

W. M. REED, *Clerk.*

28 In U. S. Circuit Court, at Tyler.

W. H. BARNETT
*vs.*
CITY OF DENISON. } No. 1555. Special Charge No. 3.

The plaintiff asks the court to charge the jury that the evidence in this case shows that W. H. Barnett, the plaintiff in this case, purchased the bonds and part of the coupons in said suit before the same became due, without knowledge of any defects in them and for a valuable consideration: Therefore, as to the bonds and all coupons not due at the time of the purchase, he is an innocent purchaser for value before maturity, and in his hands the same are valid obligations against the city, because the city had a right to issue its bonds and Barnett, the plaintiff, had a right to presume that they were lawfully issued for a purpose and in a manner authorized by law.

H. CHILTON,
H. M. WHITAKER,
*Att'ys for Pl'ff.*

Refused May 15th, 1886.

C. B. SABIN,
*U. S. Dist. Judge for the Eastern District of Texas.*

Filed May 15th, 1886.

W. M. REED, *Clerk.*

29 In U. S. Circuit —, at Tyler.

W. H. BARNETT
*vs.*
CITY OF DENISON. } No. 1555. Special Charge No. 4.

The plaintiff asks the court to charge the jury that municipal corporations are equally and to the same extent liable for the frauds and wrongs of their agents perpetrated in the course of their employment as individuals would be under like circumstances, and if the evidence in this case show that the bonds and coupons in this case were executed and placed in the hands of Edward Perry, who was treasurer of the city of Denison, and he delivered the same without authority, nevertheless the city would be bound to pay them in the hands of a holder unacquainted with these facts, because

Perry was the agent of the city, and it should suffer for the fraud or wrongs of its agents rather than an innocent purchaser.

H. CHILTON,
H. M. WHITAKER,
*Att'ys for Pl'ff.*

Refused May 15th, 1886.

C. B. SABIN,
*U. S. Dist. Judge for the Eastern Dist. of Texas.*

Filed May 15th, 1886.

W. M. REED, *Clerk.*

30 Which charges were by the court refused; to which action of the court the plaintiff, by counsel, then, in open court, excepted, before the jury retired from the box, and asks that this bill of exceptions be signed and sealed as such.

Agreed to.

HORACE CHILTON,
H. M. WHITAKER,
*Att'ys for Pl'ff.*
W. S. HERNDON,
J. C. ROBERTSON,
*Att'ys for Def't.*

The foregoing bill of exceptions is approved in open court this 7th day of June, A. D. 1886.

Given under my hand and seal this 7th day of June, A. D. 1886, at Tyler, Texas, in open court.

CHAUNCEY B. SABIN, [SEAL.]
*U. S. District Judge for the Eastern District of Texas.*

Endorsed on back of bill: No. 1555. W. H. Barnett *vs.* City of Denison. Bill of exceptions. Filed June 7th, 1886. W. M. Reed, clerk.

31 *Final Judgment.*

Circuit Court United States, Eastern District of Texas.

W. H. BARNETT
*vs.*
THE CITY OF DENISON. } No. 1555.

MAY 15TH, 1886.

This day came on to be further heard the above-entitled cause, the parties having appeared, by their attorneys, and announced ready for trial on Monday, May 10th, 1886; and thereupon came a jury of good and lawful men, to wit, R. T. McFarland, Burrell Erwin, Knox Jones, W. E. Booth, Jno. S. Shivers, J. F. Coble, J. H. Carter, Phillip Bennett, Allen Smith, Bedford Park, Jno. Waul, Rob't Pinkston, having been duly selected, empannelled, and sworn;

the trial of said cause progressed from day to day, the evidence was adduced, and the argument of counsel had and the charge of the court given to the jury; to which charge pl'ff's attorneys excepted and tendered a bill of exceptions. Thereupon the jury considered of their verdict and returned into open court the following verdict, to wit:

"We, the jury, find for the defendant.

R. T. McFARLAND,
*Foreman Jury.*"

It is therefore considered, ordered, and adjudged that the said plaintiff, W. H. Barnett, take nothing by his said suit; that the said defendant, The City of Denison, go hence without day and recover all the cost in this behalf expended, to be taxed by the clerk, for which let execution issue.

32 *Motion for New Trial.*

In the Circuit Court of the United States for the Eastern District of Texas.

W. H. BARNETT
*vs.*
THE CITY OF DENISON. } No. 1555.

Now comes the plaintiff and moves the court to grant a new trial in the above-entitled cause for the following reasons, to wit:

1. That the court erred in charging the jury that the failure to state on the face of the bond, in so many words, the purpose thereof rendered the same dishonored paper, so as to let in all defenses good against the original holder to destroy the rights of the *bona fide* holder, Barnett.

2. Because the court erred in not declaring to the jury that the bonds were not void for lack of such specification, and that the specification was sufficiently made by referring to the ordinance authorizing the bonds.

3. The court erred in charging the jury that there was no evidence to show that the city received anything for said bonds.

4. The court erred in not giving plaintiff's special charge No. 1, to the effect that a *bona fide* holder of said bonds would be protected if city had authority under any circumstances to issue same.

5. The court erred in not giving plaintiff's special charge
33 No. 2, to the effect that the presumption arising from the possession of the bonds was that plaintiff was a *bona fide* holder, and that a like presumption existed with regard to the Commercial bank, from whom plaintiff purchased.

6. The court erred in not giving plaintiff's special charge No. 3, to the effect that the city is responsible for the acts of its agents, and if the city officers wrongfully or without authority delivered its bonds and coupons and they afterwards came into the hands of a *bona fide* holder the city is nevertheless liable.

7. The court erred in not giving plaintiff's special charge No. 4, to the effect that as there was no evidence that the bonds or coupons in suit were issued to the Texas and Atlantic Refrigerator Car Co. that the jury would not consider the plea of failure of consideration.

8. The court erred in not charging the jury that, as to the coupons falling due after Barnett purchased, the defendant was clearly liable, and that they should find accordingly.

H. M. WHITAKER,
H. CHILTON,
*Att'ys for Plaintiff.*

Endorsed: Motion for new trial. Filed May 17th, 1886. W. M. Reed, clerk, by W. A. Allen, deputy.

34 *Judgment on Motion.*

W. H. BARNETT
*vs.*
CITY OF DENISON. } No. 1555.

TUESDAY, *May 25th, A. D.* 1886.

This day came on to be heard the motion of pl'ff's attorney for a new trial, and the parties, by their attorneys, announced ready for trial, and the same was argued by counsel and considered by the court, and the same was overruled; to which plaintiff excepts and gives notice that he will prosecute a writ of error, and the court fixes the bond at the sum of $500.00.

*Assignment of Errors.*

In the Circuit Court of the United States for the Eastern District of Texas.

W. H. BARNETT
*vs.*
CITY OF DENISON. } No. 1555. Assignment of Errors.

Now comes plaintiff in error, W. H. Barnett, and assigns the following errors committed by the circuit court on the trial of above-entitled cause:

1st. The court erred in charging the jury, in substance, that the statement of the ordinance under which the bonds were issued was not such a statement of the purpose for which they were is-
35 sued as protected plaintiff, a purchaser of the coupons for value, without notice, before maturity, from the defense of want of consideration set up by the defendant.

H. M. WHITAKER,
H. CHILTON,
*Att'ys and Counsel for Plaintiff.*

Endorsed on back: No. 1555. Assignment of errors. Filed Sept. 22nd, 1888. W. M. Reed, clerk.

36 No. 1555.

In the Circuit Court of the United States for the Eastern District of Texas, at Tyler.

I, W. M. Reed, clerk of the circuit court of the United States for the eastern district of Texas, do hereby certify that the foregoing thirty-five pages of manuscript contain a full, true, and correct copy and transcript of original & amended petition, defendant's answer & demurrer, defendant's exception to pl'ff's petition, defendant's plea of failure of consideration, plaintiff's bill of exceptions, pl'ff's special charges, judgment final, judge's charge to jury, motion for new trial, judgment on said motion, assignment of errors in this case, No. 1555, W. H. Barnett *vs.* The City of Denison, all of which appears from the records of said court now in my office.

The Seal of the U. S. Circuit Court, Eastern Dist. Texas, Tyler.

In testimony whereof I hereunto set my hand and affix the seal of said court, at Tyler, Texas, this 6th day of October, A. D. 1888.

W. M. REED,
*Clerk of said U. S. Circuit Court,*
By —— ——, *Deputy.*

[Endorsed:] No. 1555. In U. S. circuit court, eastern district of Texas. W. H. Barnett *vs.* City of Denison.

37 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at Tyler, Texas, between W. H. Barnett, as plaintiff, and The City of Denison, a corporation under the laws of the State of Texas, defendant, in which suit a final judgment was rendered in said court, at Tyler, at the May term thereof, 1886, to wit, on May 15th, 1886, said case being numbered on the law docket of said court No. 1555, a manifest error hath happened, to the great damage of the said W. H. Barnett, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

The Seal of the U. S. Circuit Court, Eastern Dist. Texas, Tyler.

Witness the Honorable Samuel F. Miller, associate justice of the said Supreme Court, the 5th day of May, in the year of our Lord one thousand eight hundred and eighty-eight.

W. M. REED,
*Clerk of the Circuit Court of the United States for the Eastern District of Texas, at Tyler.*

Allowed by—
CHAUNCEY B. SABIN,
*U. S. District Judge for the Eastern District of Texas.*

Galveston, Texas, May 7th, 1888.

38 [Endorsed:] No. 1555. W. H. Barnett *vs.* City of Denison. Writ of error. Filed May 5, 1888. W. M. Reed, clerk. Refiled May 9th, 1888. W. M. Reed, clerk.

Came to hand May 26th, 1888, and executed same day by delivering to W. S. Herndon, att'y for the city of Denison, in person, a true copy of the within writ of error.

R. B. REAGAN,
*U. S. Marshal,*
By JNO. W. SPIVEY, *Deputy.*

39 UNITED STATES OF AMERICA, *ss:*

To the City of Denison or its attorney of record, W. S. Herndon, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and for the eastern district of Texas, at Tyler, wherein W. H. Barnett is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel F. Miller, associate justice of the Supreme Court of the United States, this 7th day of May, A. D. 1888.

CHAUNCEY B. SABIN,
*U. S. District Judge for the Eastern District of Texas.*

Came to hand May 26th, 1888, and executed same day by delivering to W. S. Herndon, att'y for the city of Denison, in person, a true copy of the within citation in error.

R. B. REAGAN,
*U. S. Marshal,*
JNO. W. SPIVEY, *Deputy.*

40 [Endorsed:] No. 1555. W. H. Barnett *vs.* City of Denison. Citation in error. Filed May 9, 1888. W. M. Reed, clerk.

41 [Endorsed:] W. H. Barnett, plaintiff in error, *vs.* The City of Denison, defendant in error. No. 1555. Applied for on the 25th day of September, 1888, by Horace Chilton and H. M. Whitaker, attorneys for plaintiff in error, and delivered to them on the 6th day of October, 1888. W. M. Reed, clerk U. S. circuit court, E. D. T., at Tyler, Texas.

Endorsed on cover: Case No. 13,440. E. Texas C. C. U. S. No. 297. W. H. Barnett, plaintiff in error, *vs.* The City of Denison. Filed December 10, 1888.

JAMES H. McKENNEY,
CLERK.

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No. 297.

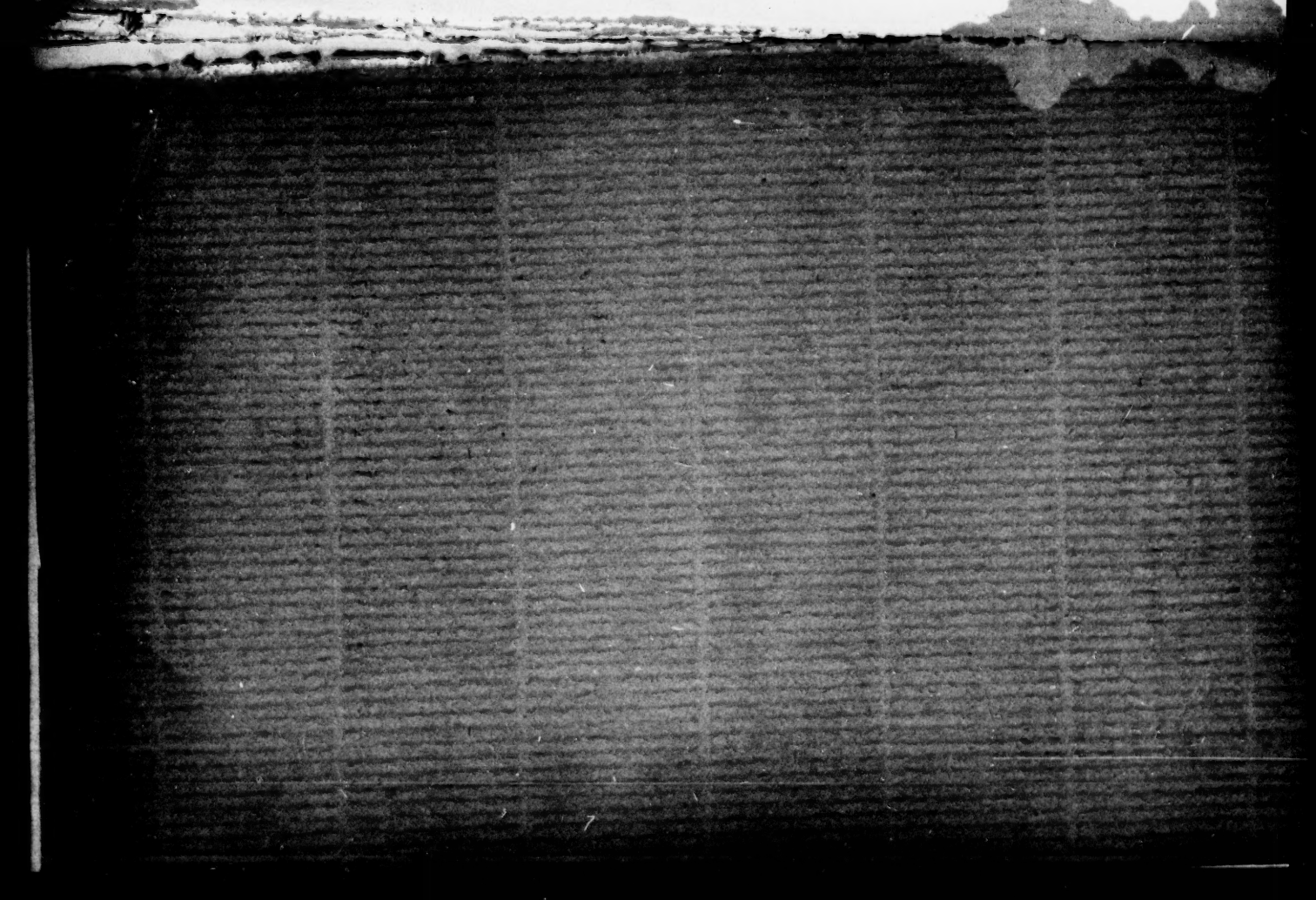
W. H. BARNETT, PLAINTIFF IN ERROR,

*vs.*

THE CITY OF DENISON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

## BRIEF FOR PLAINTIFF IN ERROR.



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Suit by Plaintiff in Error against Defendant in Error on 144 coupons, of $25.00 each, originally attached to bonds of the Defendant in Error. Said coupons maturing, 16 on January 1, 1875, and 16 every six months thereafter up to and including January 1, 1878, bearing interest at the rate of ten per centum per annum after maturity, as specified in the bonds. Plaintiff alleges that he acquired the instrument sued on as an innocent or *bona fide* purchaser for value before maturity. (Record 1.)

Defendant pleads

(1) *Non est factum.* (Record 2.)

(2) That the bonds were prepared to be used in the fulfillment of a conditional contract with the Texas & Atlantic Refrigerator Car Co., "which contract never matured, the conditions were never performed, the bonds were never demanded, and the bonds printed were not in proper form and substance, and were in fact ordered to be canceled by the city council, and were supposed and believed to be canceled until the institution of this suit." That they were fraudulently put in circulation, and plaintiff participated in and knew of the fraud, and therefore could not recover. (Record 3.)

(3) That there was a failure of consideration for said bonds, in that the Texas & Atlantic Refrigerrtor Car Co. failed to comply with and fulfill the terms of the contract with the City of Denison, on the faith of which the bonds were issued. (Record 4-5.)

The evidence showed that the City of Denison had authority, under its charter,

(1) Sec. 27. 'To borrow money on the credit of the city and issue bonds therefor."

And under this section it was provided that "All bonds shall specify for what purpose they were issued, and not to be invalid if sold for less than their par value." (Record 6.)

(2) Sec. 28. "To issue bonds in aid of any corporation or enterprise, either manufacturing, railroad, or for other purposes calculated to advance the interest of the said city, and to borrow money for that purpose, and to take stock therein, or in any of them." (Record 6.)

On August 9, 1873, an ordinance was passed by the City of Denison "authorizing the issuance of city bonds to the amount of twenty thousand dollars for the reduction of and cancellation of the outstanding city scrip, and for the improvement of streets, etc." (Record 7.)

A copy of the bond to which the coupons sued on were originally a part was in evidence, and contained the following recital: "These bonds are issued by virtue of an ordinance passed by the board of aldermen of the said city on the 9th day of August and approved by the mayor on the 9th day of August, 1873." (Record 8.)

It was "agreed that the Plaintiff was entitled to recover on the coupons" sued on as an innocent purchaser for value before maturity, unless the failure to specify the purpose for which the bonds were issued more particularly than therein contained defeated them. It was further agreed that "the said bonds and coupons were issued under the ordinance dated August 9, 1873 hereinbefore copied, and under the provisions of the city charter hereinbefore set out.

And further, that "if the failure to state the purpose for which the bonds were issued more specially than is contained in said bonds, was such a defect as deprived them of the

quality of negotiable paper, and visited all purchasers for value with notice, then the City of Denison had a good defense to the suit; but if not such a defect then the Plaintiff ought to recover as prayed for in his petition." (Record 9.)

Under the above state of facts the Court charged the jury to find for the defendant, which was done and judgment accordingly. To this charge, as well as the refusal of the Court to give special charges requested, exception was reserved. And thereupon the following error is assigned as presenting the questions involved.

*Assignment of Error.*

1. The Court erred in charging the jury, in substance, that the statement of the ordinance under which the bonds were issued was not such a statement of the purpose for which they were issued as protected Plaintiff, a purchaser of the coupons for value without notice, before maturity, from the defense of want of consideration set up by the Defendant. (Record 16.)

This error was assigned on the following charge of the Court and special charges requested by plaintiff and refused:

"The bonds themselves do not specify for what purpose they were issued, which renders them defective and subjects them to any defense which the city may have against them, thereby impairing their commercial value.

The charter, which is the source of their power for issuance, by one of its provisions declares that said charter shall be deemed a public act, and shall be so regarded in all courts and places. The section of the charter authorizing the issuance of the bonds provided for in the ordinance makes this requirment or provision, viz: 'All bonds shall specify for what purpose they were issued, and shall not be invalid if sold for less than their face value.'

The bonds are made payable to blank or bearer, and were for a period of years, and were purchased before maturity. It was the particular object of the Legislature that these bonds should specify upon their face or upon the paper upon which they were made the purpose for which they were issued. The bonds fail to disclose their purpose. They refer to an ordinance, not by way of disclosing their purpose, but by way of announcing by virtue of what authority they were issued. There are two ways by which this provision of the Statute can be overcome or got around. One is to ignore it altogether. The other is to construe it away by saying that the clause is simply directory, or that the authority for issuance referred to in the bond having contained the necessary declaration of purpose, that might be regarded as a sufficient compliance (with) the Statute. But one way by which force can be given to it, and that is to hold such bond defective, at least to the ex-

tent of subjecting it to any defenses which might exist between the original parties thereto, and the question is: what shall be done in this case? The charter, or rather the act of the Legislature creating the same, by its having declared itself a public act and providing that it may be read in evidence without proof, and that judicial notice thereof shall be taken in courts and places, necessarily affected all persons with notice of its requirements. In other words, notice was imputed to all persons purchasing bonds that the purpose for which they were issued shall be stated therein; but if not so stated therein, what then? What is the Court to say about it? Why, that questions may be raised thereon.

In this case questions of the making and lawful issuance of the bonds and of the failure of their consideration are presented, and as it uncontradictedly appears that the defendant received no consideration for the bonds, you are directed to find a verdict for the defendant." (Record 10-11.)

The following special charge (No. 1) will be sufficient to show the question involved:

"The plaintiff asks the Court to charge the jury that the evidence in this case shows that the City of Denison had a right to issue bonds, because its charter gave it that right. Therefore, a purchaser of its bonds, if he is such purchaser without notice of any defect in said bonds, if any defect exists, and for a valuable consideration, has a right to presume that they were issued under such circumstances as gave the requisite authority, and such bona fide holder will be entitled to recover, although the bonds may have been issued for a purpose and in a manner not authorized by law." (Record 12.)

*I.*

When a municipal corporation has power under any circumstances to issue negotiable securities the *bona fide* purchaser has a right to presume that they were issued under circumstances and for a purpose which give the requisite authority, and they are no more liable to be impeached for any infirmity in the hands of such a purchaser than any other commercial paper.

*Supervisors vs. Schenck*, 5 Wall, 784.
*Mayor vs. Lord*, 7 Wall, 414.
*Bank vs. Bank*, 10 Wall, 644-645.
*St. Joseph Township vs. Rogers*, 16 Wall, 666.
*Chambers Co. vs. Clews*, 21 Wall, 323.
*San Antonia* vs. *Lane*, 32 Texas, 413.

*II.*

Where, as in this case, the holder of municipal bonds purchased them before their maturity, and without notice of any defense, and they recite that they were issued under a certain ordinance, a reference to which shows a legal and proper purpose for the use and benefit of the city, the purchaser is thereby assured of the validity of the bonds, and it would be tolerating a fraud to permit the city to show that the bonds were not in fact issued for such purpose. The city is estopped from denying the truth of the recitals in its bonds.

*County of Moultrie* vs. *Savings Bank*, 92 U. S. 631, 636.
*Town of Coloma* vs. *Eaves*, 92 U. S. 484, 487.
*San Antonio* vs. *Mahaffey*, 96 U. S. 312, 314.
*Nauvo* vs. *Ritter*, 97 U. S. 389, 391.
*Hackett* vs. *Ottawa*, 99 U. S. 95.
*Walnut* vs. *Wade*, 103 U. S. 683, 695.
*County of Clay* vs. *Society for Savings*, 104 U. S. 579, 589.
*Ottawa* vs. *National Bank*, 105 U. S. 343.

As hereinbefore shown the bonds themselves on their face recited the ordinance by date under which they were issued. The ordinance recites that the bonds were authorized for the redemption of city scrip and other indebtedness, and for the improvement of the streets. Failure of consideration was the defense under which the Court instructed the jury that the Plaintiff could not recover. Which we submit was error.

The concession that plaintiff made out his case and was entitled to recover as an innocent holder for value before maturity, unless the failure to state the purpose for which the bonds were issued more particularly than is contained in the said bonds, deprived him of his right as an innocent holder, in effect concedes the correctness of the two foregoing propositions.

*III.*

The material proposition in the case, then is, that where, as in this case, a bond or other instrument has been issued by virtue of a certain ordinance referred to, but not copied or described,

such recital is notice of the contents of the ordinance; and as such ordinance recites the purpose for which the bonds are authorized, the bonds thereby, in effect, specify for what purpose they were issued.

The Supreme Court of Kansas, under a statute which provides that "they (the bonds) *shall specify* on their face the date, amonnt, *for what purpose issued*, to whom, the time they run, and the rate of interest," say

"We have stated that the bonds do not in terms specify upon their face the purpose for which they were issued, but we think they do in effect. The bonds specify on their face that they were "issued in pursuance of an act entitled 'An Act to enable School Districts in the State of Kansas to issue bonds,' approved February, 1886, and acts amendatory and supplemental thereto." Now, under that act bonds could be issued only for one purpose—that of providing a school house for the district, either by erecting or purchasing the same. It is true that it was not necessary that the bonds should recite the act under which they were issued, but as the bonds did recite the act under which they were issued, and as that act authorized bonds to be issued only for one purpose, the bonds do in effect recite the purpose for which they were issued."

*Kansas vs. School District No. 3, Chatauqua Co.*, 34 Kansas, 243.
*S. C. 9 Am. and Eng. Corp. Cases*, 594.

The same court, through Justice Brewer, says:

"At the close of the obligatory words they read: 'By order of Board of Commissioners of the County of Bourbon, dated March 8, 1867.' The purchaser, therefore, is notified on the face of the instrument of the particular order under which the bonds were issued. Claiming under one instrument which recites the existence of another and refers to it as the authority for its own existence, is he not charged with notice of the contents of the latter?"

*Lewis vs. Bourbon Co.*, 12 Kansas, 222.

This court in effect holds that a recital in a bond of an ordinance for its authority is notice of the contents of the ordinance.

*Hackett vs. Ottawa*, 99 U. S., 95.
*Ottawa vs. National Bank*, 105 U. S., 343.

It is a well recognized elementary principle that recitals in muniments of title are notice of everything to which the attention is thereby directed. This proposition is announced as analagous to the principle involved in the present case.

*1 Story's Eq.* § 400.

*V.*

The provision of Section 27 of the charter of the City of Denison (Record 6) prescribing that bonds issued under that section shall specify for what purpose they were issued, is merely directory, and the absence of such recital from the bonds will not affect the rights of a *bona fide* holder for value.

*Young* vs. *Camden Co.* 19 Mo. 310.

*VI.*

In conclusion we respectfully submit that the Plaintiff in Error is entitled under the law and facts to a judgment in his favor against the City of Denison for the amount sued for by him.

H. Clarkson
Counsel for Pl'ff

Transcripts

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Records

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